The Unseen Hand

Unelected EU Legislators

Editors
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THE UNSEEN HAND: UNELECTED EU LEGISLATORS

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Contents

Introduction

RINUS VAN SCHENDELEN AND ROGER SCULLY

Rinus van Schendelen is Professor of Political Science at Erasmus University Rotterdam, Netherlands; Roger Scully is Lecturer in European Politics at the University of Wales, Aberystwyth.

THE UNSEEN HAND OF UNELECTED LEGISLATORS IN THE EU: WHY EXAMINE THIS SUBJECT?

The European Union (EU) is of great importance as a policy-and lawmaker in contemporary Europe. To a considerable extent, the 'authoritative allocation of values' today is conducted by or through the Union. Yet in recent years there has also been growing criticism of the EU for the manner in which laws and policies are made. Complaints about the Union policy process being secretive, closed and/or bureaucratic have frequently been made, often grouped together under the general label of the 'democratic deficit'.[1]

It is often difficult, however, to judge whether such criticisms of the EU are wholly justified. How widespread and far-reaching is the phenomenon of unelected legislators in the EU? How much power do such people wield, when, where and how? And how distinctive does this make the EU? It is difficult to attempt definitive answers to such questions at the moment, for despite a torrent of discussion in this area, detailed empirical investigations have been rare. This is what this volume provides, while remaining aware that our work has wider implications of considerable importance to the development of the EU, and touches on matters of great potential controversy. Though this volume is essentially an empirical one and tries to open windows on the phenomenon of EU legislation by unelected individuals, we begin with reflections on the theoretical underpinnings for much of the current debate.

THE DEMOCRATIC THEORY OF PUBLIC LEGISLATION

Public legislation is defined here as *the making of externally binding decisions by a public authority*. This definition excludes from consideration two types of binding decisions:

- *Internal* legislation that binds only members of a decision-making organisation itself. For example the Rules of the House made by a parliament for its own organisation do not bind outsiders.
- *Private* legislation that binds others outside—such as the terms of a contract between a company and its clients.[2]

Our focus, therefore, is on legislation with both an external and a public character. This public legislation is, typically, made by a public body such as a parliament, ministry or agency. Such a body generally has legal authority to make binding decisions for (at least some part of) the citizenship. It is not necessarily authoritative in the sense of being accepted as legitimate by the wider society. Ultimately, however, it can make itself accepted by its legal monopoly of coercion, and the use of police and jail systems.

Yet in modern times the production of public legislation has become increasingly subject to the norms of democracy.[3] These state that public laws must reflect the wishes of citizens. How this is to be done, however, remains essentially contested territory. We consider three versions of how to achieve democratic public legislation: the simple, the modified and the realistic theory.

The Simple Theory

The simple theory of democratic legislation is based on electoral democracy, and holds that only elected politicians should make decisions binding on society. Proposals for legislation may come from civil servants or groups in civil society, but they should be decided upon only by those who are elected to do so.[4] In most Western societies, this equates primarily to the national parliament. However, territorial decentralisation may also allow for elected legislatures at the regional or local level. Functional decentralisation may also permit elected legislative councils: a notable example is the Low Countries' elected polder-board regulating the water economy.

The charm of this theory is its simplicity. If electoral democracy is the best form of government, then elected representatives should, surely, be those making public legislation. However, while electoral democracy may remain the ideal, in practice many people, including many elected representatives, consider parliaments to be seriously deficient as lawmaking bodies. They often lack, among other things, the expertise, staffing resources, organisation, cohesion and flexibility needed for the making of quality legislation. Thus, in no European country does the elected body act as the exclusive legislator. The simple theory needs modification.

The Modified Theory

Electoral democracy remains the basis of our modified theory. Ultimately public legislation is still subject to elected politicians. But decisions on legislative proposals can, by an act of public law itself, be delegated to another body as secondary legislator and can even allow further subdelegation.[5] A new act can always reverse such delegation. In most European countries, the parliament is the main so-called *delegans*, delegating its power of public legislation to the executive as a whole, to individual ministries or to special agencies, which all thereby become *delegataris*. They all belong to the public system, and their legislative products remain public as well. In the case of territorial or functional decentralisation, the respective councils can delegate the power of public legislation to the administration or to parts of it as well.

The modified theory thus contains an 'either…or' formula: public legislation must be decided either by the elected body itself or on behalf of it by a body authorised by it. Authorised bodies can usually act with a high degree of autonomy, although frequently elected politicians question the delegated acts, politicise the social outcomes, scrutinise the use of the powers or otherwise challenge the delegated authority by debate. Delegation, then, may look like a *mandate*, which allows the higher body to intervene in the lower one. Formally, however, the latter can resist that intervention as long as it holds the delegated power.

The modified theory represents current practice now. Across contemporary Europe, the bulk of public laws at the national level consist of delegated legislation, with estimates putting it at between 85 and 95 per cent of all legislative output, the remainder coming from parliament. Delegated legislation has been criticised for three main reasons.[6] First, and simplest, legislation passed by a body other than the elected one contravenes the basic principle of 'no taxation (legislation) without representation'. Second, a more specific complaint is that delegation facilitates a 'constitutional dictatorship', by marginalising the elected body, and especially the opposition.[7] Finally, it endangers legal safeguards, as it leaves the contents of secondary legislation to the discretion of authorised bodies, acting rapidly and (possibly) opportunistically.

More recently, however, others have given a more positive interpretation to the delegation process.[8] Delegated legislation has been seen, first, as a relief for the overburdened elected body. Government, it is suggested, can become more effective if the elected body focuses on the core business of 'high politics' and leaves the details of 'low politics' to secondary bodies. Second, delegation potentially allows for greater flexibility, enabling both a measure of legal 'experimentation' and the fine-tuning of laws. Third, the problem of control is often overstated: various types of 'fire alarms' can offer warnings of poorly functioning legislation, and the elected chamber always retains the ability to intervene by debate, scrutiny and, ultimately, legislation.

The Realistic Theory

While our modified theory adds some greater realism to an understanding of the development of public legislation, any reasonably comprehensive and realistic understanding must also include an awareness of other types of law and legislator.[9] The first of these is the court system, which, by its *jurisdiction* can produce decisions binding on society. These decisions have to remain within the existing legal order, as created by or on behalf of an elected body. But as that order is always a matter of interpretation, courts can modify as well as codify it. In many countries the higher courts can even correct parliamentary laws, if these are seen as conflicting with the constitution. Formally the court remains within the democratic order, as that constitution, in written or unwritten form, has been accepted by parliament. In reality, however, decisions of the court may often contravene the wishes of the elected chamber, and a court can effectively be an independent legislator.

Further realism involves recognition of non-formal public legislation or so-called *soft law*. There are two main variants: discretionary and supplementary legislation. The former gives decision-makers the discretion to do what is not clearly forbidden and not to do what is not clearly prescribed. The implementation of legislation usually gives those in positions of authority considerable room for manoeuvre, as laws must be applied to many different specific cases, which are seldom anticipated in advance. Both the rules and the cases, then, have to be interpreted. This is standard practice, for example, in the field of taxation and subsidy laws. By supplementary legislation we mean public speeches, memoranda, announcements and other rhetorical statements by those in positions of authority. Formally, such things are not law at all, but in practice they may have considerable binding effects.

Finally, we should include inspired legislation. This refers to law frequently written by a lobby group from the civil society and more or less rubberstamped by a public body.[10] Whether this should be considered democratic legislation is highly contentious. Many would be uneasy about public bodies endorsing texts produced by others, as successful lobbying rather than wider public considerations may be the dominant factor here. But others see groups in civil society as the supreme source of democratic legislation, as they consider the citizenship superior to the elected and even more to the authorised bodies.

This discussion leads us to a twin recognition: first, that public legislation comes in many different forms and from many sources and, second, that far from being dry and dull, consideration of this topic raises fundamental and contentious questions of power, authority and accountability. We now go on to consider the relevance of such questions in today's European Union.

PUBLIC LEGISLATION IN THE EU

The European Union is a remarkable achievement by any standard: a highly developed and institutionalised form of inter-state co-operation. An important part of this co-operation is the development of substantial quantities of public legislation to govern the various aspects of life that have been subject to the integration process. But on what basis

should such public legislation be developed? Not surprisingly, opinions differ. Among journalists and politicians, strong support exists for the simple theory of public legislation—if not the European Parliament, then national parliaments should be the ultimate legislator. Civil servants and people in quasigovernmental bodies usually prefer the modified theory, which justifies their occupation of the driver's seat. Lobbyists from the civil society tend to prefer the realistic theory, which gives them the greatest opportunities. There are also varying points of view across countries. The simple theory is popular in the northern countries and particularly in the United Kingdom—reflecting perhaps the historical legacy of revolts against the power of the King or Church and its early replacement by some form of parliamentary government.[11] The modified theory, which emphasises delegated legislation, has its main support in the southern area, which begins in Belgium. These countries have a long tradition of administrative government, with much delegated legislation. The realistic theory finds greatest support in more pluralistic countries like Germany, Austria, Denmark and the Netherlands. Strong civil organisations here have a record of countervailing influence against top-down legislation by the state apparatus.

These different preferences and traditions come together, and mix, at the EU level. How they work in practice is dependent upon both formal provisions (what we might term the 'skeleton' of EU legislation) and their practical application (to continue the metaphor, the 'body' of flesh and blood). We now consider both in turn.

The Skeleton

The hard core of the EU skeleton is the *primary* legislation of the treaties. Although the EU has external treaties on matters like international trade, of most relevance for our purposes are the *internal* treaties, for they distribute formal powers over subsequent legislation. The 1957 Treaty of Rome, much amended subsequently, is the key document. It details fully the procedures for secondary legislation by the Council, partially those of delegated legislation by the Commission and fully those of binding jurisdiction by the Court.[12]

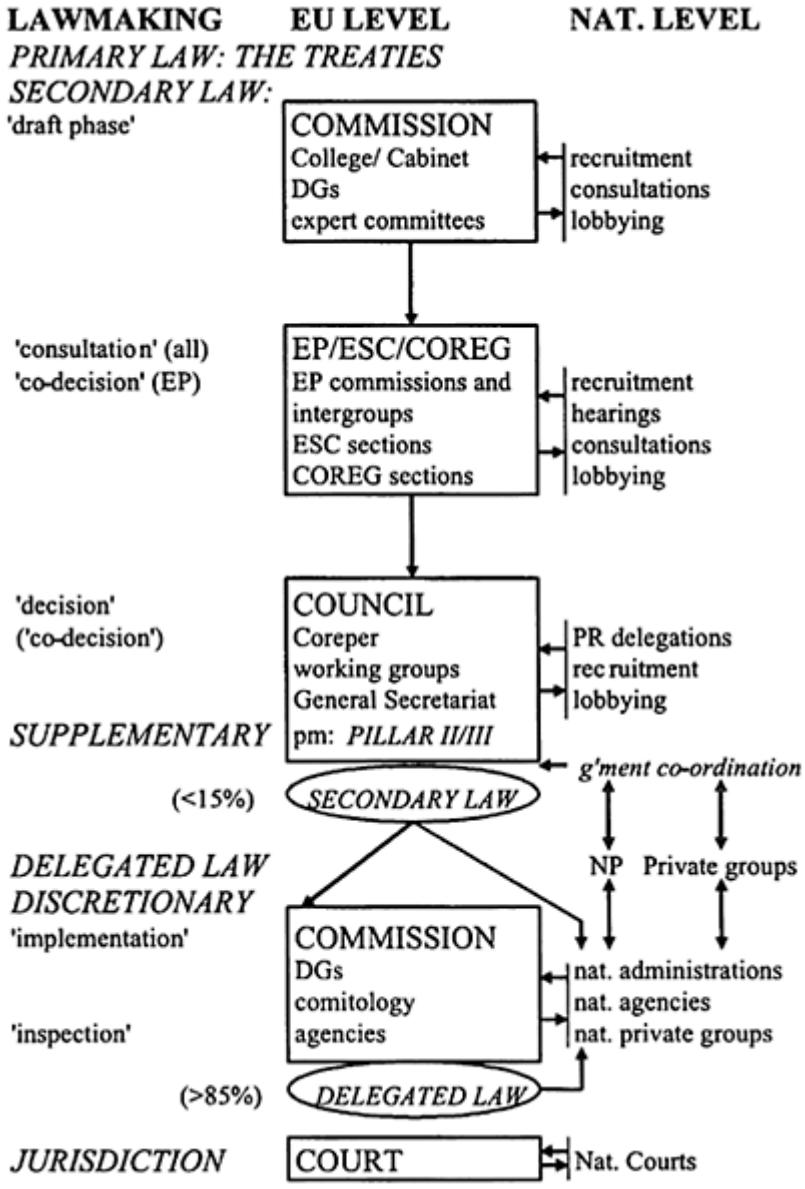
The distribution of powers of *secondary* legislation looks complex. Under Pillar I (socio-economic policies), the Council must decide on any new legislative initiative from the Commission. For matters of implementation it may delegate the power of decision to the Commission and/or, via directives, decentralise it to member states. The treaties grant the Commission exclusive power to make legislative proposals, and give it some autonomous powers in specific fields like competition and external trade. In addition it receives delegated powers from the Council. The EP must at least be consulted by the Council on legislation, and in specified and currently the largest number of policy areas it has the position of codecision-maker, granting it powers of amendment and veto. The Economic and Social Committee (ESC), which represents major socio-economic interest groups, and the Committee of the Regions (COREG), which represents regional and local public authorities, have to be consulted by the Council and/or the Commission in specified cases. In Pillar II (foreign affairs and defence) and III (home affairs and justice) the Council is formally almost both the start and finish of legislation, with the other institutions being less involved. In 2001 about 15 per cent of all new EU laws (1,496 in all) belonged to the secondary category.[13]

The Commission is responsible for *delegated* legislation.[14] Its authority to make binding decisions comes partially from the treaties (for example, on competition policy), but often from the Council. Its main apparatus of delegated legislation is the system of comitology. This involves about 450 formal committees, established by a Council decision and composed of national representatives, frequently including those from civil society. Roughly one-half of them are advisory committees, to which the Commission must give the utmost attention; the others are management or regulatory committees. If disagreement arises between the Commission and such a committee the Council is entitled to interfere; if in an area falling under co-decision, so too is the EP. In 2001, about 85 per cent of total EU legislative output was delegated legislation consisting of 18 directives, 600 regulations and 651 decrees. According to some scholars, this type of legislation concerns only 'low politics' matters of technical implementation, compared to more 'high politics' matters often dealt with in secondary legislation.[15] However, it is difficult to find any objective criteria by which to weigh the importance of laws, and interest groups from civil society often regard the delegated details of law as more pertinent than the secondary headlines, the former being more binding than the latter. To them, the devil is often in the detail.

The Court is empowered by the treaties, in addition to other legal tasks, to make binding jurisprudence based on primary law.[16] In this sense, it is more than equal to the secondary legislator, being able to overrule the Council if the latter has taken a decision that contravenes the treaties—as it did in 2000 on the Tobacco Advertisement Ban Directive. If the Council neglects to act on treaty agreements, the Court can also create case-law through setting a precedent, as it did regarding cross-border health insurance (the 1998 Decker and Kohll cases). And by reference to primary law it can also overrule the Commission on matters of delegated or discretionary legislation.

FIGURE 1

EU LEGISLATION: SKELETON AND BODY



The 'Body' of Flesh and Blood

Figure 1 both summarises the skeleton (mid-column and labels on the left) and adds the 'flesh and blood' (labels on the right) of how practice may often depart from, or add to, the provisions of the formal treaties.

The *Commission* is an organisation of fewer than 15,000 civil servants, excluding technical, secretarial and language staff.[17] Most staff belong to the Directorates-General (DGs) and the special agencies, that have mixed tasks of implementation and inspection. Being understaffed, the Commission must make use of people from outside. One way that this is done is through the 'outsourcing' of work: the implementation of directives is generally left to national governments, and much research and management is tendered out to private consultancies. Another means of coping is through the 'insourcing' of three categories of personnel from outside: temporary personnel (about 2,000 people), national civil servants on secondment (about 1,000) and 'experts' who represent major stakeholders in a policy area and meet in committees. There are about 1,000 registered expert committees, comprising some 50,000 members together, coming almost 50–50 from public and private (profit and non-profit) sector organisations. It is estimated that another 1,000 non-registered committees exist.[18] On each of these committees, a *chef de dossier* from the responsible Commission DG will seek consensus on persisting differences, and usually take the result as the input for the secondary or the delegated process of legislation. In the latter case the Commission has at its disposal another 450 committees: the aforementioned comitology. Stakeholders, of course, try to establish a position in both groups of committees, often through the same person. In addition to all these semi-formal arrangements, there is much informal lobbying by stakeholders.[19]

The *European Parliament* is much more than merely 626 individual MEPs.[20] It has a staff of about 4,000 people, encompassing personal assistants, party staff and staff of the chamber as a whole. All observers of the chamber agree that the EP's committees are highly important in policy development, with a key role often played by the rapporteur, an individual member designated as responsible for developing the committee's report and getting it adopted in plenary. There are also about 80 informal 'intergroups', consisting of MEPs and lobbyists who work together on a common interest, such as animal welfare, and often attempt to win support for their position in plenary. MEPs are also strongly influenced by party ties—both in terms of the multi-national party groups, and the more specific links to domestic parties in their member state. Finally, there is an increasing amount of informal lobbying of the EP More or less the same practices can be found in the ESC and the COREG.

The *Council of Ministers* is actually a collection of about ten subject-specific Councils, plus the 'General Affairs' Council of senior foreign ministers and the European Council. The Council, or Councils, takes relatively few decisions itself.[21] Usually meeting only a few times a year, the ministers of a Council spend much of their time discussing hitherto unsettled issues ('B'-points) and producing public declarations. Most items are effectively decided in the Committee of Permanent Representatives (Coreper) or its parallel bodies for agriculture and Pillars II and III, consisting of about 800 people from the member states' Permanent Representation offices. But much preparatory work for these committees is, in turn, conducted by some 300 working groups, officially

composed of national government experts and unofficially of many people from both decentralised governments and private organisations. If a proposal for Council legislation is considered by the responsible working group to be politically acceptable, then it gets an A-mark on the Council agenda and this is usually rubberstamped by ministers. A Secretariat-General (SG) of about 2,500 people, responsible for administrative back-up, supports the Council. But, in practice, the dividing line between politics and administration may be very blurred. Thus, stakeholders include other institutions and groups from the civil society, lobby working groups, Permanent Representations and the SG.[22]

The *Court* is also more than its 15 judges, one per member state. Since 1989 it has had a Court of First Instance (CFI) responsible for fast-track processing of individual cases, potentially resulting in new legal precedents. Excluding translation experts, the Court has almost 600 staff. Most important are the referendaries, who prepare the dossiers for the judges and are frequently taken as authoritative experts. They can also have informal contacts with stakeholders.

Hydra-Headed EU Legislation

The skeleton of EU public legislation already looked complex. But the added flesh and blood gives it an even more hydra-headed appearance. The simple theory giving all legislative power to elected representatives certainly does not describe how things work in the EU. Directly elected MEPs and the mainly indirectly elected members of COREG play a formal role, but mainly in relation to the small volume of secondary legislation and often are only consulted. Many, though not all, national parliaments are even more marginalised.[23] The modified theory draws important attention to the issue of delegated legislation, but remains incomplete. Only our realistic theory comes close to describing what occurs in the EU.

All variants of legislation appear to be part of the EU system, produced at three different levels. At the formal level, the institutions are responsible for the publication of legislative decisions reported in the EU's Official Journal. On primary legislation (internal treaties) the European Council plays a primary role on behalf of the member state governments. On secondary legislation in Pillar I the Commission and the Council are primary, the former for the proposal and the latter for the decision, while the EP's position varies according to issue area. Delegated legislation falls under the Commission, although the Council and the Parliament may be involved in areas of dispute. Discretionary legislation is also a Commission affair. Supplementary legislation comes from all three institutions: from Commission white books, Parliamentary resolutions and Council declarations. The Court legislates by jurisdiction.

At the semi-formal level, assigned people and groups are in charge of legislative production. High-level working groups representing national capitals make primary legislation. Secondary legislation is in the hands of *chefs de dossier* and the expert committees of the Commission, rapporteurs and the staff of the EP, and the working groups and SG of the Council. Delegated legislation is processed mainly through comitology committees and agencies of the Commission. High-ranking Commission officials and *chefs de dossier* also play a crucial role in discretionary legislation. Special

units of the Commission, inter-groups of the EP and conferences of the Council produce supplementary legislation. The referendaries are the working level of the Court.

At the informal level, all sorts of stakeholders who have an interest in the outcome may play a decisive role. In addition, they can be the source of one other type of legislation: inspired legislation. Such stakeholders can literally come from anywhere: but most come from outside the EU institutions, and belong to the civil society of member countries or even the foreign countries.[24] Companies, trade organisations, non-governmental groups, local authorities and other organisations coming from civil society are, ultimately, the most interested stakeholders in that they have to live with what emerges from the EU legislative process. Many of them are indirectly linked to the institutions at the formal level, directly to the assigned people and groups at the semi-formal one and actively lobbying at the informal level.

Ultimately, our interest here is not in who signs a piece of legislation, or who takes the final, formal decision. That can be little more than rubberstamping. We want to know *who* is really making or writing the text of legislation in the EU, and *how* they do so.

OUTLINE OF THE VOLUME

The focus of the rest of the book is on the main elements of the EU system and the five variants of legislation identified above. Thus, the aim is not to say everything about all types of legislation or unelected legislator, but to cover the most important aspects. We seek, moreover, to present not a tight framework, but a number of highly salient windows and perspectives.

Commission statutory staff are considered in Michelle Cini's contribution. These include the *chefs de dossier* and others who contribute to the drafts of both hard and soft law. A well-known saying among lobby groups is that 'one has to be in this early phase as 80% and more of the draft text becomes the final text'. Is this simply a myth, or does this folk wisdom reflect reality? Commission staff produce a lot of soft supplementary law, for example, by way of white books, prospects and benchmarks. Some are most open for inspired legislation.

'In-sourced' experts are the focus of Rinus van Schendelen's attention. They sit in the many expert committees for drafting legislation, the 450 comitology committees, and the working groups for filtering secondary law. They come from both the public and the private levels of the member countries. As stakeholders they can be big producers of inspired legislation. In many cases they are lobbyists themselves. They may even contribute to the soft law coming from the Commission or the Council.

The Parliament's staff members are the topic of Karlheinz Neunreither's contribution. They can behave as 'unelected representatives', as Michael Malbin once titled his book on the US Congress.[25] As assistants to individual MEPs, their party formations or the EP commissions and units, they can be the people who really handle the texts of secondary or supplementary legislation. Amendments and resolutions, for example, they can write or receive ready-made from the outside. They can set into motion the EP's challenge of the delegated and the discretionary legislation of the Commission and the EP's pushing of Court jurisdiction.

Lobby groups from the member countries and even foreign countries are active everywhere in the EU system, but particularly inside the EP. Lobbyists targeting the Parliament are discussed by David Earnshaw and David Judge. Some hold a semi-formal position inside an inter-group; most rely on informal lobbying, for example by exchanging information and support with important MEPs, by trying to influence the choice of a rapporteur or by seeking to frame the terms of discussion on an issue.

Thomas Christiansen focuses on the Council's Secretariat-General. Supposedly purely administrative in function, this body may, however, have a great impact on all variants of legislation. Its highest officials are involved in new treaty formation. In Pillar II and III it is functionally equivalent to the Commission as sketched above. In Pillar I it handles the last phase of secondary legislation, including the provisions for delegated law-making. From its desks come many supplementary declarations. It may even be inspired from outside.

The Court, presented by Michelle Everson, is the most undisputed unelected legislator. Its jurisdiction is widely accepted. It may affect all other variants of EU legislation, if it sees them as being in conflict with the treaties. As an apparatus itself, it may have its own layers of people who write the jurisprudence, for example, its referendaries. By its prejudicial advice it may directly affect the secondary and the delegated legislation.

Our conclusions summarise the findings of the previous discussions, and attempt to put them in both an analytical and a normative perspective. Is the phenomenon of unelected legislation also unrepresentative and ultimately undemocratic? Is it excessively widespread in the EU, and the source of serious problems for the EU? Or, alternatively, despite contravening some norms of representative democracy, does it offer certain strengths for a democratic political system? And is it exceptional only for the EU or does it reflect current practices at national levels?

NOTES

1. Perhaps the foremost discussion of the 'democratic deficit' is that of R.Dehousse, 'Constitutional Reform in the European Community', in J.Hayward (ed.), *The Crisis of Representation in Europe* (London: Frank Cass, 1995), pp. 118–36. However, a contrary case, questioning whether the EU in fact enjoys a democratic 'surplus', has also been put: see S. Meunier-Aitsahalia and G.Ross, 'Democratic Deficit or Democratic Surplus: a Reply to Andrew Moravcsik', *French Politics and Society*, Vol. 11 (Winter 1993), pp. 57–69.
2. In daily practice, however, the two types of legislation we exclude from consideration may sometimes fall into a grey area. For instance, a private contract must remain within the limits of civil law made by a public authority. However, our basic conceptual distinction remains valid.
3. For a general discussion, see D.Held, *Models of Democracy* (Oxford: Polity Press, 2nd edn., 1996).
4. A.H.Birch, *Representative and Responsible Government* (London: Unwin, 1964).
5. J.Blondel, *Comparative Legislatures* (Englewood Cliffs: Prentice Hall, 1973); S.E.Finer, *Comparing Constitutions* (Oxford: Oxford University Press, rev. edn., 1995); T.Bergman, W.C.Müller and K.Strom (eds.), 'Parliamentary Democracy and the Chain of Delegation', *European Journal of Political Research*, Vol. 37, No. 3 (2000), special issue.
6. C.T.Carr, *Delegated Legislation* (Cambridge: Cambridge University Press, 1921); C.-M. Chen, *Parliamentary Opinion of Delegated Legislation* (New York: AMS Press, 1933).

7. On ‘the principle’, S.Barber, *The Constitution and the Delegation of Congressional Power* (Chicago, IL: Chicago Press, 1975); on ‘the dictatorship’ C.Rossiter, *Constitutional Dictatorship* (New York: Harbinger, 1948).
8. See note 6; also, R.Kiewet and M.McCubbins, *The Logic of Delegation* (Chicago, IL: Chicago Press, 1991); D.Epstein and S.O’Halloran, *Delegating Powers* (Cambridge: Cambridge University Press, 1999); and L.Martin, *Democratic Commitments: Legislatures and International Cooperation* (Princeton, NJ: Princeton University Press, 2000).
9. G.Sartori, *The Theory of Democracy Revisited* (Chatham, NJ: Chatham House, 1987); T. Bergman and E.Damgaard (eds.), ‘Delegation and Accountability in European Integration’, *Journal of Legislative Studies*, Vol. 6, No.l (2000), special issue.
10. For example, see C.Miller, *Lobbying* (Oxford: Basil Blackwell, 1987).
11. For example, see V.Herman and J.Lodge, *The European Parliament and the European Community* (London: Macmillan, 1978).
12. A warning about terminology is worthwhile here. In the United Kingdom, in the absence of a written constitution, all legislation passed by parliament is primary and all delegated law is thus considered secondary. In other EU countries and the EU itself, all legislation directly coming after the constitution or the treaties is secondary. It may contain provisions for delegated legislation, which is, as it were, tertiary.
13. *General Report 2001,* Chapter X, Section 1, No. 1212 (Table 28).
14. R.Pedler and G.Schaefer (eds.), *Shaping European Law and Policy: Committees and Comitology* (Maastricht: Eipa, 1996); M.van Schendelen (ed.), *EU Committees as Influential Policymakers* (Aldershot: Ashgate, 1998).
15. For example, N.Nugent, *Government and Politics of the EU* (London: Macmillan, 1999), p. 257.
16. R.Dehousse, *The Court of Justice* (London: Macmillan, 1998).
17. European Commission, *Designing Tomorrow’s Commission* (Brussels, 7 July 1999); G. Edwards and D.Spence (eds.), *The European Commission* (Harlow: Longman, 1994).
18. Van Schendelen, *EU Committees as Influential Policymakers,* ‘Introduction’.
19. See note 14.
20. R.Corbett, F.Jacobs and M.Shackleton, *The European Parliament* (London: Harper, 4th edn., 2000).
21. M.Westlake, *The Council of Ministers* (London: Cartermill, 1995).
22. See note 14.
23. P.Norton, *National Parliaments and the European Union* (London: Frank Cass, 1998).
24. M.van Schendelen (ed.), *National Public and Private EC Lobbying* (Aldershot: Dartmouth, 1993); R.Pedler and M.van Schendelen (eds.), *Lobbying the EU* (Aldershot: Dartmouth, 1995); M.van Schendelen, *Machiavelli in Brussels: The Art of EU Lobbying* (Amsterdam: Amsterdam University Press, 2002).
25. M.Malbin, *The Unelected Representatives* (New York: Basic Books, 1979).

The European Commission: An Unelected Legislator?

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The Commission is the closest thing we have to a government in the European Union, though the word government (and the connotations generally associated with it) tells us little about what the Commission does in practice. The Commission is certainly an executive, in that it wields 'executive power', but as Allum points out this concept 'comprises two institutional realities and two types of personnel that, for heuristic reasons, it is useful to distinguish: ministers who form the political executive…and civil servants' responsible for public administration.[1] However, within the Commission we can identify both political and administrative executive power—even if that power does not belong exclusively to the Commission. In the European Union various institutions and agencies share executive power, and unlike its member states the Commission operates on the basis of a separation of powers closer to that found within the political system of the United States.[2]

Prima facie, we might expect to find that the EU's legislatures (the Council and Parliament) legislate while the executive (the Commission and Council) provides political leadership and executes/implements policy. Yet while this classical constitutional model provides us with a convenient starting point for understanding how the EU operates, the practice of modern government and the realities of EU politics lead us in a rather different direction, making sense of the question: 'Is the European Commission an unelected legislator'?

This article argues that the Commission does indeed act on occasions as a *de facto* legislator, but to clarify what is meant by this requires distinguishing its role in the making of secondary legislation from its rulemaking functions under delegated legislation and its informal policymaking capacity. While all three may be policy-relevant and politically important, necessitating a blurring of the old politics-administration dichotomy, the latter raises the most contentious questions about the accountability of the Commission's role within the European policy process. The sections below outline the ways in which the Commission performs these functions. The article begins with a brief introduction to the European Commission, focusing on the Commission's role in the making of secondary legislation (or policy law). The second section highlights the Commission's role in issuing delegated legislation (or administrative law); while the third

points to the Commission's use of less formal policy instruments in the form of 'soft law'. The final section returns to the question posed above, not only to review the basis upon which the Commission is deemed to be an unelected legislator, but also to identify the implications of this claim.

INSIDE THE COMMISSION

As one of the EU's executive bodies, the Commission performs both political and administrative functions. These are echoed in its structure, which comprises a political 'head' and administrative 'body'. The political Commission is composed of the 20 Members of the Commission (or Commissioners) who together form the decision-taking College. Each Commissioner is supported by a team of seven appointees, in the shape of a *cabinet* (or personal office). The administrative Commission comprises 24 Directorates-General (DGs) dealing mainly with functional policies such as agriculture and social policy, and a small number of horizontal services, including the Legal Service and the Secretariat-General, which play a co-ordination role both within the Commission and externally.

Under the EU's first pillar, which deals with socio-economic affairs, staff located within DGs are responsible for the drafting of secondary legislation,[3] which is subsequently approved by the EU Council and (usually) the European Parliament. As we shall see below, DGs also take the lead in drafting delegated legislation, which operates under a rather different logic. In this case, the Commission itself agrees the legislation, albeit with the involvement of committees of national experts. Formally, the College is the authorised decision-taker within the Commission. While decisions regarding secondary legislation are sought on the basis of a consensus, simple majorities are all that are needed for the College's approval. This happens at the weekly meetings, or on the basis of a written procedure. In both cases, meetings of *cabinet* members precede those of the College, preparing the ground and often ironing out contentious issues in advance. In policy areas where high numbers of extremely technical decisions are taken as a matter of course, authority may be delegated to the Commissioner responsible through a procedure known as *habilitation*.[4] Delegated decision-making procedures within the Commission give a certain degree of autonomy to Commissioners, the extent of which is determined by how carefully officials and cabinet members in cognate policy areas scrutinise beyond their own departmental boundaries. In some cases, the issues concerned will be consensual. In others, there may be scope for more contested issues to slip through the net. At the very least, decisions taken in this fashion may be harder for outsiders to follow in those areas. This is true of the agricultural sphere, for example, where delegated decision-making contributes to the 'dense veil of ignorance' for consumers and taxpayers, which is said to characterise this policy.[5]

It is not only at the level of the Commissioners and cabinets that there is scope for autonomous decision-making. The way in which Commission business is organised at the level of the services also allows for a substantial degree of discretion by middle-ranking officials. Proposals are drafted within the DGs by officials often at the A4 or A5 grade, and though vetted by their superiors and subject to inter-service scrutiny, this gives the *fonctionnaire* concerned scope to be creative, particularly when the dossier is a

technically difficult one. Indeed, it should not be forgotten that in the early 1990s roughly 80 per cent of the content of secondary legislation was attributed to the work of the Commission at this stage.[6] This percentage may be even higher now given the more widespread use of qualified majority voting by the Council, a development that may have further strengthened the Commission's hand during the formulation of legislation. Moreover, this middle-ranking official, often identified as the *chef de dossier* (or the *chef de file* or *rapporteur*) is responsible not only for the draft proposal as it circulates within the Commission, but he also follows its progress once the College has approved it. Yet the *chef de dossier* is much less accountable than, say, the Commissioner—even if at a later stage they may appear before the relevant EP committee or Council working group to defend the Commission's line.

Commission staff do more than just initiate legislation. They are also important agenda-setters within the EU's policy/legislative process. Thus, it has been argued that the Commission acts as policy entrepreneur,[7] seeking to build consensus among public and private actors (and especially the governments of the member states), while at the same time attempting to 'upgrade the common interest' (as neo-functionalists put it) in an effort to raise the stakes of European integration. It mediates among the EU's 15 member states, and other institutions and actors involved in policy-making and implementation. It executes, administers and manages policies agreed by the Council and Parliament (or by the Council alone); and it represents the EU externally, particularly in global economic arenas, such as the World Trade Organisation. It is among these functions, which in practice are anything but discrete, that we are likely to find, if it exists, the Commission's legislative role. Yet although the Commission is present at all stages of the legislative process, assuming different roles and performing a variety of functions throughout, it is not formally a legislator.

There is only one set of exceptions to this general rule. These allow the Commission to 'enact Community norms without the formal involvement of any other Community institution'.[8] An example is found in Article 39 (3) (d) (ex.48 (3) (d)), which allows the Commission to lay down the conditions under which workers have the right to remain in a member state in which they have been employed.[9] However, the most commonly cited instance of this phenomenon relates to the Commission's right to issue Directives or Decisions to ensure the application of Article 86 (3) (ex.90 (3)).[10] This provision empowers the Commission to take action against member states where they allow firms exclusive or special rights (as in the case of certain utilities). A case brought against the Commission in the late 1980s, involving the so-called 'Transparency Directive',[11] the first directive issued under this treaty article, confirmed the right of the Commission to legislate in this way. This Commission Directive was intended to clarify the financial relationship between governments and public enterprises, especially in the manufacturing sector. Interestingly, the Commission subsequently claimed that the treaty provision concerned did not endow it with a legislative tool, but merely with an opportunity for policy clarification under existing legislation.[12] The Commission's claim that it was not a legislator on this occasion points to the importance of a distinction that was earlier made by the editors of this volume: between policy law and administrative law. This distinction is pivotal in understanding the *de facto* 'legislative' role of the Commission.

Policy law generally refers to legislation made by parliaments, which may be controversial or politically sensitive and which has clear-cut policy implications. By

contrast, administrative law is generally deemed to be much less politically important and deals with technical matters that either permit the implementation of policy law or clarify its application. While all modern states have some element of policy and administrative law, the hard-and-fast distinction between the two is more familiar to southern Europeans than it is to those in the north of Europe, corresponding to a distinctively legal-political tradition of executive rule-making by strong bureaucracies and judiciaries.[13]

In the EU case, the dichotomy between policy law and administrative law is drawn from a French tradition in which

> Bureaucracy is accepted and welcomed as an essential tool for effective policy-making and governance, and law [is] seen as an instrument for the proper implementation of policy…"law" is widely interpreted so as to include legislation and regulation, and rulemaking becomes a central task for administrative law.[14]

Such an approach contributes to a process of juridification at European level which involves the proliferation on the one hand of 'regulation and rule making and, on the other hand, of litigation and rule-interpretation', a process which Harlow criticises for its undemocratic implications.[15] Criticisms such as these are very much in line with recent challenges to the so-called Monnet Method (or Community Method) of decision-making, which has long privileged executive actors at the expense of legislatures and which, it has been suggested, also over-values unelected and (more importantly) unaccountable experts within the European policy process, contributing to legislation into which stakeholders have little, if any, input.

COMMISSION RULE—MAKING: DIRECT AND INDIRECT IMPLEMENTATION[16]

Formally, the Commission is not a legislator (other than in very exceptional cases) under the 'standard method' of Community legislation: that is, where policy law is involved. It is, however, a 'legislator' of administrative law. From the outset, the drafters of the EC Treaties acknowledged that the Council would inevitably lack the resources to perform all legislative functions necessary to ensure the implementation of EC law. In other words:

> because of the frequent need for quick decisions in that grey area where policy overlaps with administration, and because too of the need to relieve the normal legislative process of over-involvement with highly detailed and specialised matters, it is desirable to have truncated and special rule-making arrangements for administrative and technical law.[17]

As a result, in policy areas where the approval of large numbers of decisions were likely, the treaties enabled the EU institutions to involve themselves directly in the administration (or implementation) of a policy. This is often referred to as 'direct implementation' and is particularly prevalent within the EU's common policies. An

example of this is in the fisheries domain where the Commission performs a crucial role aggregating expertise and providing a scientifically defensible rationale for the regime. In this case, it is the Council that, according to Lequesne, involves itself in the direct implementation of the policy.[18] In the field of competition policy, as detailed below, it is the Commission that is responsible for direct implementation.

More than this, however, Article 211 (ex.155) of the EC Treaty includes a clause that explicitly allows the Commission to 'exercise the powers conferred on it by the Council for the implementation of rules laid down by the latter'. This means that even in those policy areas where direct implementation is not provided for, the Council may delegate rule-making functions to the Commission. As a consequence, the potential scope of delegated legislation is extremely wide. Indeed, almost all secondary legislation involves some form of delegated and supplementary rule-making or standard-setting. Although the Commission is usually the body responsible for this form of implementation, other actors—European standards agencies, for example—often have an important role to play at this stage of the policy process.

In 1986, Article 10 of the Single European Act of 1986 modified Article 202 (ex.145) with the aim of clarifying the Council's right to delegate. Thus, the Council shall:

> confer on the Commission, in the acts that the Council adopts, powers for the implementation of the rules that the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with the principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.[19]

Thus, not only does the Treaty once again confirm the Council's right to delegate, but it also now provides a legal base for the system of comitology that allows the Council to monitor and to an extent control Commission rule-making—even if the extent of that control is constrained. Delegation must not involve the creation of new powers and rule-making must only be authorised within the existing competences of the Commission and according to the Council's directions.[20] In other words, the Council does not formally give the Commission *carte blanche*,[21] and may reserve for itself implementing powers in particularly sensitive areas.[22]

Nugent is adamant that while the 'Commission thus appears to be an extremely important legislator' the 'appearance…does not fully reflect reality, for Commission legislation is mostly of a "second order" nature and is made via procedures under which the Commission is normally subject to Council scrutiny and, if necessary, control'.[23] The reference to 'second order' legislation implies that much of the rule-making undertaken by the Commission is of an extremely technical nature, which 'does not normally involve issues that raise questions of political principle and/or judgement'.[24] From this viewpoint, 'it is precisely because it is administrative rather than political that it is delegated to the Commission'.[25] Although impressive numerically, if 'these powers are considered from the viewpoint not of quantity but of quality, it must be observed that the Council usually

displays an extremely narrow view of the administrative tasks to be entrusted to the Commission'.[26]

However, it would be a mistake to assume delegated legislation to be uncontroversial and apolitical, though much of the debate on this score revolves around definitions of 'technical', 'administrative', 'political', 'judgement' and 'interpretation', and where one draws the line between these concepts. Yet there is no doubting that the vast majority of EU law and EU rules originate from within the Commission, that secondary legislation approved by the Council and Parliament rarely regulates the content of issues, and that this is reflected in the conduct of interest groups lobbying the EU—who tend to recognise that the details are often more contentious (that is, political) than the framework in which they sit. An example of this can be found in the Council/European Parliament Regulation on the European Food Authority adopted at the end of January 2002,[27] where all the real issues of content have been transferred to the delegated legislation. If it *were* true that all delegated legislation was non-controversial, the Council would have little interest in overseeing the work of the Commission, and the Parliament would not be motivated to involve itself in matters of comitology. However, to claim that delegated legislation may have policy implications is not the same as claiming that the Commission acts autonomously in performing its rule-making function. Assessments of autonomy thus need to take on board both the Commission's involvement, and that of other institutional actors, such as the relevant committees. Yet it would not be inaccurate to claim that both Commission discretion and the policy-relevance of delegated legislation are likely to be greater in cases where the Commission's executive rule-making powers are treaty-based, rather than delegated in an *ad hoc* fashion by the Council. It is in such cases, which cover policies relating to anti-dumping and competition for example, that Gormley sees the EC Treaty going beyond that of a framework *(traitécadre),* serving more as Treaty Law *(traité-loi)* or even a Management Treaty *(traité de gestion).*[28]

Although there are limits to the extent to which one can generalise from the case of European competition policy, there are implications that may be drawn out of this unique case. Under the EC Treaty, the Commission is responsible for the implementation of a range of policies falling under the heading of Competition. These normally include policy towards restrictive practices or 'cartels' (Article 91 (ex.85)), and abusive monopolies (Article 92 (ex.86)), though the EU's state aid policy may also be included under this heading (Articles 87–89 (ex.92–4)).[29] Arising out of these treaty provisions, and as a consequence of its right to take legally binding decisions in individual cases, the Commission—or more specifically DG Competition (formerly DG IV)—has been able to define EU policy at arms length from both the Council and the Parliament. This is particularly the case in the field of state aid control. It is clear that the constraints on the Commission in this policy domain are much less extensive than in the vast majority of EU policies. For example, only an advisory committee governs competition rule-making with little more than moral weight to bring to bear upon the Commission. Yet, two broader insights are worth emphasising at this point. These relate to the extent of Commission discretion, and the pivotal relationship between Court and Commission in the regulation of competition in the European Union.

First, in the competition policy domain the Treaty clearly allows the Commission discretion in achieving the objectives laid out as a framework. While the end (admittedly in a very general sense) may be unequivocal, the means are very much left up to the

Commission to agree. In other words, it is the Commission that decides which areas to prioritise, and which to deemphasise; and it is the Commission that decides which cases to pursue through formal procedures, and which to deal with much more informally. An example of where this sort of approach has been adopted includes the banking and insurance sectors, where the Commission sought to apply the competition rules for the first time in the 1990s. The *Crédit Lyonnais* case was a landmark in this respect, involving as it did aid from the French government that would save the bank from collapse. Commission approval was only granted after serious concessions had been made by the company, not least the selling off of much of its international network. In cases such as these, it may seem that the Commission acts in a manner that is unaccountable given the discretion officials possess, even if decisions are subject to judicial review. This discretion takes a number of forms, but is directly related to the taking of decisions that cumulatively establish precedents and thereby shape (or are used to shape) policy.

Second, inextricably linked to the Commission's discretion is the importance of the relationship between Commission and Court, which has been crucial in cases where Commission decisions have been adjudicated in rulings that establish precedents in case law. Although the two institutions have not always seen eye-to-eye on matters of competition policy, it is only with the Court's support that the Commission has been able to wield the power it has in this policy area. In the field of merger control, for example, the application to mergers of what was then Article 86, which dealt with abuses of a dominant position, and Article 85, regarding cartels—an application which had not been the intention of those who had designed the competition regime—caused a worrying degree of uncertainty for the business community over the Commission's treatment of European-scale mergers. With the application of Articles 85 and 86 in this way confirmed by the European Court, national governments stepped in to reintroduce legal certainty by agreeing at the end of 1989 to a Merger Regulation. Although this was a Council Regulation, it is unlikely that this legislation would have seen the light of day without the earlier involvement of the Commission and Court. Indeed, Commission proposals for a Merger Regulation, the first of which was in the early 1970s, had failed to meet with approval in the Council.[30]

SOFT LAW: INFORMAL POLICY-MAKING BY THE COMMISSION

By the end of the 1990s the number of delegated legislative acts issued by the Commission was beginning to fall as a consequence of Commission efforts to simplify and restrict the scope of European legislation. However, it is interesting to note that while there was a fall in absolute terms relative to the total amount of EU legislation proposed, the proportion of delegated acts was, at the same time, increasing in relative terms.[31] These trends have gone hand-in-hand with the increased use by the Commission of recommendations, opinions and other more informal policy instruments,[32] identified here as 'soft law'. Soft law refers to 'texts' such as speeches, policy statements, media interviews and journal articles, which serve to detail and illuminate legislation or to fill a legislative void. Although some may argue that the very concept of 'soft law' is meaningless (those who belong to the 'law-is-hard-or-it-is-not-law' school), the

distinction between hard and soft law is one that may add to our understanding of the relationship between law and policy.[33] Thus, while soft law may well suggest a trend away from codification and 'undue judicialisation',[34] it also implies what may appear obvious to many observers of political life: that an absence of (hard) law does not necessarily mean an absence of policy. Indeed, it also hints at the fact that the boundaries between what is and is not law—or legislation—can often be blurred. Moreover, it has been suggested that soft law in a particular policy domain eventually becomes formal legislation, as expectations of supranational activity shift and precedents for EU decision-taking are established. An example of this is in the foreign policy sphere, which Dehousse and Weiler claim was responsible for the emergence of a sense of comity prior to the establishment of the common foreign and security policy at Maastricht.[35]

There are numerous examples of how the Commission has used soft law as a policy tool. In the fields of consumer policy, environmental policy and state aid control, for example, soft measures have been used for a wide variety of reasons: as a way of communicating with its constituencies and stakeholders; to clarify the law, where further legislation is impossible or illadvised; or to demonstrate its adherence to a less coercive and more politically sensitive alternative to regulation. Even so, soft law is said to invite soft compliance, and, as a consequence, may never be anything other than a second best solution to policy problems that require some measure of compulsion. The fact that soft law is not (generally) legally binding and that implementation rests on rather vague notions of goodwill or moral obligation suggests a rather shaky foundation on which to construct Europewide policy.

> Moreover, when soft law is used, parliaments tend to be bypassed; its content is often vague and non-judiciable; it may be inconsistent with existing legislation; it tends to be inaccessible and opaque, with little scope for public input; and it can allow judges and/or administrators a dominant role in the making of policy.[36]

However, this is not to claim that soft law is always inappropriate: far from it! Some examples suggest that it has many uses. In the field of EC consumer law, for example, the Commission's failed attempts to get the Council to agree hard legislative acts in the 1970s was replaced by a new softer strategy at the beginning of the 1980s. In this case, however,

> The motivations for the EC's conversion to soft law are not altogether clear. Certainly some of the rhetoric suggests a belief that better regulation can result from concertation between the social partners; but one suspects that the underlying reason is a desire to head off criticism that it is being too interventionist by demanding regulation in areas where business and some Member States believe soft law could provide an adequate solution.[37]

In the state aid field, the Commission has long used soft law as a way of avoiding more contentious harder forms of regulation which the Council would find difficult to approve, and which would ultimately place constraints on the Commission's discretion and on the

flexibility of the policy.[38] Even though in the state aid case there is some evidence of a hardening of the soft law approach in the form of moves towards codification, the Commission recognises the value of maintaining a mix of instruments, reflecting the distinctive characteristics of this policy.

Moreover, the increased application of soft law is part-and-parcel of a wider trend towards more consensual and voluntaristic approaches to policy-making, understood as part of a broader trend towards greater informality and flexibility. Examples of such an approach do not always privilege the Commission directly, though even the application of what is called the 'open method of co-ordination' in European monetary policy, governments seem happier to allow the Commission a soft co-ordinating role, where a harder regulatory function would not gain support and could even provoke a backlash against the Europeanisation of policy.[39] Yet while approaches such as these may not involve *de jure* legislation, *de facto* policy aims and outcomes may not be very different.

CONCLUSION

In response to the question 'is the European Commission an unelected legislator?' the answer must be 'yes', the Commission is unelected, and 'yes', it does on occasions legislate. But this adds nothing to what we already know about the Commission. More helpful is to ask why this question is an interesting one to address. It is interesting because to identify the Commission as an unelected legislator is to imply that law is somehow being made in an unaccountable manner and that our expectations about how an executive (one which includes both a political leadership and an administrative dimension) ought to behave have in some way been challenged. The question therefore conflates two issues: the first is whether the Commission does indeed make law; and the second—whether in making law, it is acting autonomously—or at least with a wide margin of policy discretion.

Above, we have seen that there are three main ways in which the Commission might be identified as a legislator. First, it is centrally involved in the formulation of secondary legislation. Second, the Commission is responsible for much of the delegated legislation issued within the EU. Third, it makes what is often called 'soft law', a more informally quasi-legal policy instrument. It is the cumulative impact of these three forms of Commission involvement in European legislation that supports the claim that the Commission is an unelected legislator.

Commission involvement in secondary legislation is far-reaching, even if this may more conventionally be defined as policy influence rather than legislation. Scope for individual DGs or officials to shape legislative outcomes is substantial, contributing to the Commission's centrality within the EU policy process. The making of administrative law is a conventional executive function which corresponds to the Commission's role as one of the EU's two joint executives (the other being the Council). Legislatures delegate the making of administrative law to executives for many different reasons, most notably in order to counter collective action problems and to ensure the credibility of policy. But in the case of the EU, national governments have been selective in their delegation, and tended to concentrate their delegation on regulatory policies (rather than those more politically contentious issues, such as foreign policy or institutional reform).[40] Indeed, it

is perhaps more helpful to stick to the more appropriate labelling of the Commission as regulator or rule-maker rather than as legislator—though this is not to imply the rules it makes never have broad policy or political implications.

The contours of soft law are less easily defined than administrative law, and some definitional stretching is required if the issuing of texts that comprise soft law really allows us to call the Commission a legislator. In this instance, it is more appropriate to define the Commission as a policy-maker, albeit within the confines of existing treaty and legislative frameworks, and within what the Commission assesses are the legitimate expectations of a majority of national governments. But to call the Commission a policymaker is not to play down the importance of this function. Indeed, in the making of soft law there are fewer constraints placed upon the Commission than is the case for its regulatory responsibilities. Moreover, it is likely that the use of softer policy instruments will further increase in future, assuming pressure to limit the command and control regulatory approach to European-wide problem-solving persists. It is this function performed by the Commission that ought to raise most concern for those keen to ensure the legitimacy of the European policy process, as it is in the making of soft law that accountability to legislatures, national governments, constituents and the general public, as well as participation, is much more of a challenge to attain.

NOTES

1. P.Allum, *State and Society in Western Europe* (Cambridge: Polity, 1993), p. 307.
2. F.Bignami, 'An Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States', Harvard Law School, Jean Monnet Papers, 1999. www.jeanmonnetprogram.org/papers/99/990501.html.
3. In this context primary legislation refers to the treaties, and secondary legislation to Regulations, Directives and Decisions agreed by the Council and (usually) the Parliament. While the first pillar deals with social-economic policies (including EMU), the second pillar is that of the EU's Common Foreign and Security Policy. The third pillar deals with provisions on policy and judicial cooperation in criminal matters (formerly justice and home affairs).
4. Authority may also be delegated now to the Director-General concerned. D.Jacob (*chef de cabinet*, DG Research), Presentation made to the Journée d'Etudes, 'Bruxelles, nouvelle capitale des hauts fonctionnaires européens?' Université Paris-I (Panthéon-Sorbonne), 30 Nov. 2001.
5. E.Rieger, 'The Common Agricultural Policy: Politics Against Markets', in H.Wallace and W.Wallace (eds.), *Policy-Making in the European Union* (Oxford: Oxford University Press, 4th edn., 2000), p. 207.
6. R.Hull, 'Lobbying Brussels: A View from Within', in S.Mazey and J.Richardson (eds.), *Lobbying in the European Community* (Oxford: Oxford University Press, 1993), p. 83.
7. L.Cram, *Policy-Making in the EU: Conceptual Lenses and the Integration Process* (London: Routledge, 1997).
8. P.Craig and G.de Burca, *EU Law. Text, Cases and Materials* (Oxford: Oxford University Press, 2nd edn., 1998), p. 54.
9. K.P.E.Lasok, *Law and Institutions of the European Union,* (London: Butterworths, 2001), p. 240.
10. Craig and De Burca, *EU Law*, p. 54.
11. Directive on Transparency of Financial Linkages between Public Enterprises and Governments, OJ [1980] L195.

12. European Commission, *Twenty-third Report on Competition Policy* (Brussels: Office for Official Publications, 1994), p.123, cited in M.Cini and L.McGowan, *Competition Policy in the European Union* (Basingstoke: Macmillan, 1998), p. 165.
13. C.Harlow, 'European Administrative Law and the Global Challenge', RSC Working Paper, No. 98/23, European University Institute, 1998. An alternative function identified in Harlow's paper is that administrative law might serve as a means of control of the executive by the legislature—or as a way of ensuring the state is accountable to its citizens.
14. Harlow 'European Administrative Law and the Global Challenge'.
15. Harlow, 'European Administrative Law and the Global Challenge'.
16. In this article the terms 'rule-making' and 'regulation' are used interchangeably to refer to the implementation or administration of secondary legislation by executive decision.
17. N.Nugent, *The Government and Politics of the European Union* (Basingstoke: Macmillan, 1999), p. 123.
18. Lequesne, 'The Common Fisheries Policy: Letting the Little Ones Go?' in Wallace and Wallace (eds.), *Policy-Making in the European Union*, p. 346.
19. Text as it appears in the consolidated version (post-Amsterdam) of the Treaty on European Union. Note, however, that in the Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), OJ L184/23, 17.7.1999, the European Parliament has been given an enhanced role in cases where the co-decision procedure applies, though there is little evidence to suggest that this has had much impact on the EP's involvement in matters of delegated legislation.
20. Lasok, *Law and Institutions*, p. 241.
21. Craig and De Burca, *EU Law*, p. 138.
22. L.Gormley (ed.), *Introduction to the Law of the European Communities* (London: Kluwer Law, 2001), p. 204.
23. N.Nugent, *The European Commission* (Basingstoke: Palgrave, 2001), p. 264.
24. Nugent, *The European Commission*, p. 265.
25. Nugent, *The European Commission*, p. 265.
26. Gormley, *Introduction to the Law of the European Communities*, p. 206.
27. Regulation (EC) No. 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. OJ [2002] L31/1, 1.2.2002.
28. Gormley, *Introduction to the Law of the European Communities*, p. 204.
29. Note that the EU's merger policy was not included in the Treaty of Rome, but is a more recent development, arising out of Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, OJ L395, 30.12.1989 which was agreed on 21 December 1989.
30. Cini and McGowan, *Competition Policy*, pp. 116–17. See also L.McGowan and M.Cini, 'Discretion and Politicization in EU Competition Policy: the Case of Merger Control', *Governance*, Vol. 12, No. 2 (1999), pp. 175–200.
31. European Commission, *General Report on the Activities of the European Union* 2001 (Luxembourg: Office for Official Publications of the European Communities, 2002).
32. Nugent, *Government and Politics*, p. 123.
33. See, for example, B.Flynn, 'Subsidiarity and the Rise of "Soft Law" in EU Environmental Policy: Beyond Who Does What, to What It Is They Actually Do?' paper presented at the European Policy Process: HCM Network Final Workshops, University College Dublin, 8–10 May 1977; F.Beveridge and S.Nott, 'A Hard Look at Soft Law', in P.Craig and C.Harlow (eds.), *Law Making in the European Union* (London: Kluwer Law International, 1998), pp. 285–303; F.Snyder 'Soft Law and Institutional Practice in the European Community', EUI Working Paper LAW No. 93/5, European University Institute, Florence.
34. Harlow, 'European Administrative Law and the Global Challenge'.

35. R.Dehousse and J.H.H.Weiler, ‘EPC and the Single Act: From Soft Law to Hard Law?’ EUI Working Paper, EPU No. 90/1, 1990, European Policy Unit, European University Institute, Florence.
36. M.Cini, ‘The Soft Law Approach: Commission Rule-Making in the EU’s State Aid Regime’, *Journal of European Public Policy*, Vol. 8, No. 2 (2001), pp. 194–207.
37. G.G.Howells, ‘“Soft Law” in EC Consumer Law’, in Craig and Harlow (eds.), *Law Making in the European Union*, p. 320.
38. Cini, ‘The Soft Law Approach’.
39. See for example D.Hodson and I.Maher, ‘The Open Method as a New Mode of Governance, *Journal of Common Market Studies*, Vol. 39, No. 4 (2001), pp. 719–46.
40. S.Hix, *The Political System of the European Union* (Basingstoke: Macmillan, 1999), p. 54.

The In-Sourced Experts

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FROM EXPERTISE DEFICIT TO SURPLUS

The Commission, empowered by Treaty with the exclusive monopoly of drafting EU legislation, is clearly under-resourced and particularly understaffed. The average size of its almost 20 Directorates-General (DGs) is about 700 policy-related people (not including technical, secretarial and language staff) and that of a policy unit of about 20 persons. Taking all staff together, the Commission has a smaller apparatus than the local government of Rotterdam and only two per cent of that of the US federal government. At the same time it is overloaded with demands coming from the numerous interest groups, including the other EU bodies and the member-state governments, all lobbying the Commission for their desired outcomes. The overload is not only one of volume but, due to the frequently conflicting demands, also of content. The resulting issues represent the politically 'irritating' differences of Europe.

In many different ways the Commission might restore the balance between work and capacity—in short, manage the overload.[1] One major alternative is to reduce the work by selecting a few priorities, by combining single issues to a package and/or by postponing them. To a small degree the Commission does all this, but both external and internal pressures limit the room for manoeuvre. Many public and private interest groups established in the member countries and elsewhere urge it to draft measures to settle their issues. The Commission itself has a strong ambition to act as the integrator of Europe and therefore dislikes reducing the stream of work coming to it. It prefers to consider the other major alternative, namely the increase of its capacity. It might do so by hiring in more personnel, by contracting out some amount of work and/or by attracting volunteers. The first two options it uses modestly, as the member state governments are reluctant to provide the financial means for more personnel and contracts. Free of costs, however, the Commission 'outsources' the implementation of directives and much of the monitoring of policies to particularly national civil servants.[2] The third option is to attract and use volunteers.

These volunteers largely come from the public and private interest groups knocking on the doors of the Commission. As 'owners' of the issues they wish to have their interests

inside the policy-making arena, and as stakeholders they are quite prepared to volunteer contributions. The Commission makes selective use of their offers to supply assistance. Driven by a Cartesian preference to settle issues in a technocratic way, it assembles for almost every issues area a number of volunteers having special expertise and being representative of that area. For example, regarding the issue of gas hose standardisation it brings together experts representing the producers, the customers and, if relevant, other stakeholders like ministries, environmental groups or trade unions in the member countries. In such a socalled expert committee the big issue is reduced into smaller parts, which are open both for reasoned argumentation, for example a common definition or empirical evidence, and for compromise. By this method the Commission enjoys two advantages. First, step-by-step a sufficient consensus, necessary for legitimacy and acceptance, can be built up. Second, it gets high-quality labour for the low-price of reimbursement of the experts' expenses in travel, food and hotel accommodation. The average costs of an expert committee are estimated at €40,000 a year, which is less than the cost of one secretary of the Commission (C-level).[3]

These in-sourced experts are the central focus of analysis here. We limit ourselves to the experts meeting in committee under Pillar I, thus leaving aside the experts invited individually (physically or by electronic means) and sometimes connected in series, the Agencies having their own experts and the expert committees under Pillar II and III. Our observations here regard three categories of in-sourced experts in particular.[4] First, approximately 1,000 expert committees not having any formal power and advising the Commission on drafts for either secondary or delegated legislation. Together they represent a part-time assistant-bureaucracy of at least 50,000 people, centrally registered as such. If they work as experts for the Commission for only 25 days a year on average, altogether they represent some 5,000 people, which is equal to one-third of the Commission's policy staff. It is supposed that another 1,000 expert committees exist, which are not centrally registered but formed by one or the other DGs.[5] Second, there are roughly 450 expert committees having some formal powers (advisory, management or regulatory) and together labelled as 'comitology'. Under secondary legislation the Council (and under co-decision the Parliament as well) establishes them for the further production of delegated legislation, at the Commission's proposal. These two categories of expert committees fall formally or practically under the Commission. Third, we look at about 300 working groups of the Council not falling under control of the Commission but functioning in the same way as its committees. They consider the acceptability of the proposals for secondary legislation, given the decision rule in the Council (unanimity, qualified majority or simple majority).

THE EXPERT COMMITTEES

An expert committee comprises people considered expert on the matter and representative for the issue area. Formally it is the Commission that initiates the establishment of a committee and invites the members for it. In reality a higher civil servant (level A4–8), called *chef de dossier* and belonging to the DG in charge, does so. Also in reality, many interest groups lobby this person in order to influence the establishment and the composition of a committee. Their interest is to get a seat on a

relevant committee and to use this position for pushing their own interests and blocking opposing ones. The 50,000 or more people inside expert committees come almost equally from public organisations (national or regional governments and agencies) or private ones (profit or not-for-profit) operating at the domestic or the European level. Somebody from, for example, Unilever, Greenpeace, the French Ministry of Agriculture and the European Federation of Food Producers CIAA can all sit around the same table discussing the issue of genetically modified food (GMO).

The interest of the *chef de dossier* is to get the best experts in the field around the table and to have representatives for the major stakeholders. From them the *chef* can get specialised knowledge and specific support, all almost for free, thus greatly reducing his/her own costs of gathering information and producing legitimacy. In return the *chef* provides the opportunity to push or to block a legislative initiative. This process of influence usually follows three steps. First, the members are invited to define the problem. Every so-called problem represents, of course, a gap between reality and desirability. The experts around the table tend to have different views on both and thus have their issues. Their goal is to arrive at a sufficiently common definition of the problem. This prefigures the second step intended to result in a common definition of the best solution, which forms the input for the third step of drafting a piece of legislation. The key word for this process is consensus-building, to be used for pushing or blocking a legislative initiative. If the members acting as stakeholders settle their issues and arrive at sufficient consensus, then the *chef de dossier* is happy to forward their preference as the draft text for secondary or delegated legislation. In fact, the experts produce the text as they see fit and the *chef* signs it.

Four conditions in particular further the influence of the committee.[6] First, the committee itself must be seen to be composed of experts representing important organisations, and must have basic resources such as a small budget, an efficient secretariat and effective leadership. Second, the internal process must be highly interactive and include the *chef de dossier*. In best practice, the aforementioned three steps come close to a subtle shuttling of opinions during several meetings. It is favoured by informal relationships and trust, usually created (free of additional costs) on the evenings before. Third, the more the committee holds a strategic and maybe even monopolistic position in its field, the more influence it can exert. Finally, influence is achieved more easily if the draft text is designed for delegated legislation and is hardly politicised, in short if the complexity of the EU decision process is low.

The four conditions are, of course, seldom perfectly met. Members may fall short of expertise or behave more as individuals than as representatives. The committee may lack essential resources, fail in creating consensus or be challenged from outside. But to some degree all the conditions can also be manipulated for making the committee more or less influential. For example, labelling the committee as ‘scientific’ and reporting a position in mathematical form can enhance the image of expertise, while politicising an issue helps to block consensus as desired. If a committee meets all four conditions, it can have direct and strong influence on the *chef de dossier* and ultimately the Commission and thus push what it likes or hinder what it dislikes. By building the agenda it can have a mid-term influence and by framing the policy climate a long-term one.

Due to the enlargement and the proliferation of expert committees, the paradox has arisen that the single committee is losing some influence, but the system of committees is

gaining even more. An example is the Waste Management Committee, once the monopolist in its field, but now surrounded by many other committees, partially created by itself and all running this field together.[7] In general, the single committee can less easily meet the conditions of influence. Compared with the past, expertise is now more common and representation more varied as they increasingly include regional and civil interests. The limited budget has to be allocated to more committees and many more members now. The building of consensus takes more effort than in the past. Members have found alternatives for a single committee, which is also more often challenged by competitive committees. Hardly any committee has a real monopoly status anymore. Issues are more frequently politicised. One effect of these trends is that every interest group wants to take a seat in manifold committees and/or searches for alternatives like corridor lobbying. Another effect is that the *chef de dossier* gets increasingly more discretionary powers. He/she can shop for information and support from one expert committee to another, but is also more than ever dependent on the system of committees.

The output of a committee is usually a more or less common position put down on paper by the *chef de dossier*. In case this position is in favour of a legislative initiative and, after approval by the higher level of the DG, the paper normally proceeds in one of two directions.[8] One is the route to delegated legislation, where 85 per cent or more of annual EU law and most of all directives, regulations and decrees are produced. Part of the delegated powers belongs to the Commission itself, particularly in the fields of competition and external trade, but even here expert committees can prepare the Commission's decision. The bulk of delegated legislation, however, falls under the special group of comitology committees. The second route is towards secondary legislation, the source of the remaining less than 15 per cent of EU law, to be passed by Parliament and Council in particular. Here the College of the Commission has to approve the draft text. The expert committees produce for both routes and thus cover close to 100 per cent of all legislative initiatives. For example, in the field of food policy the Scientific Committee on Food produces its positions for either delegated or secondary legislation.[9] Frequently the members hardly know which route they are on.[10] The *chef* invites them to settle issues and then proceeds with their common position.

COMITOLOGY COMMITTEES

Formally there are three main types of committee having formal powers and called comitology.[11] About one half of these 450 committees has an advisory status, which formally means that the Commission must give 'the utmost attention' to their opinions and practically that the Commission has to give a good reason for its deviation from, or its rejection of, an opinion. The second type consists of management committees, which are in charge of taking administrative measures for a policy area. The third type, being roughly as numerous as the second, are regulatory committees. They have been given the authority to make decisions, which legally bind the member states. The Commission cannot simply deviate from a common opinion coming from either a management or a regulatory committee. Under the new procedure, established by the General Council in June 1999, the Commission has to forward any case of substantial disagreement between itself and such a committee to the Council. In 2000 this happened in four out of 4,358

cases of comitology involvement. Only by qualified majority ('blocking majority') before a deadline can the Council subsequently overrule the Commission; otherwise the latter can make its proposal binding.[12] If the Commission disagrees with a management or regulatory committee and if its proposal is based on a secondary law produced under co-decision, it also has to inform the Parliament. Formally as well, by an act of secondary legislation the Council, under co-decision or not, establishes these committees and determines their composition.

Reality is frequently very different from the formality.[13] The committees under comitology function in daily life much like the expert committees. Experts from (sub)national public and private organisations considered representative for a policy area meet and discuss issues and legislative initiatives both with each other and with the *chef de dossier*. The formal proposal necessary for delegated legislation can have been produced in an expert committee before or be made inside the comitology committee during the shuttling of informal opinions. The formal difference between the three types of these committees is frequently obscure in practice.[14] If the recommendation of an advisory committee is effective, it forms the crux of the Commission's decision, while the administrative measures of a management committee can be as binding as the legislation from a regulatory committee. The same conditions of influence mentioned before apply to all these committees too. But due to their smaller number, their more formalised position and the lower complexity of delegated legislation, the trends regarding these conditions are weaker, so keeping the single committee relatively strong. The Council may be in charge of establishing these committees and determining their composition, but it is the Commission that works with comitology in reality. The weakness of the Council with regard to comitology is also indicated by the outcome of the aforementioned four cases of disagreement between the Commission and a comitology committee: in none could the Council create a blocking majority and thus the Commission became the winner in all of them.

The smartest interest groups apply three influence techniques.[15] First, they recruit people who are experts not only on the content of the issue area, but also in the art of influencing the decision process, thus having both technical and political expertise. The latter is necessary for making the best possible compromise. Second, they closely follow their experts by providing support and well-defined lobby targets. The expert is not left at the mercy of his/her own capacities and mind alone. Third, for every policy area they try to parachute their experts and preferably the same person into both an expert committee and a comitology one. By such an overlapping membership they can influence both the first draft and the final decision, thus controlling delegated legislation from start to finish. Multi-national interest groups from the private sector, like Unilever and Greenpeace, frequently apply these three techniques the best. At their headquarters they usually have a so-called public affairs centre, which also makes the experts politically sensitive, provides facilities and well-defined instructions for lobbying and engineers overlapping memberships. In contrast, experts from national ministries frequently lack political expertise, sufficient facilities, useful instructions and co-ordinated action, while those from small interest groups often behave like self-employed people.[16] As persons with a free mandate they can, of course, be highly influential. But making their interest group influential is dependent on their capacity to anticipate the probable reactions at home to an outcome of their committee.

A popular belief is that expert committees have less capacity for influence than comitology ones. This belief is based on their difference of formal powers: discretionary versus delegated. With regard to comitology, it is frequently believed that advisory committees are less influential than management ones and particularly regulatory committees. However, formal powers are less than influence.[17] At the most they are a resource of potential influence and sometimes, as they also involve accountability limiting the freedom of action, they may not even be that. The best indicator of influence is that the common position of a committee is taken over by the Commission. Case studies reveal that, indeed, both expert committees and comitology ones can create the greatest success, as has been the case for both the Scientific Committee for Food and the Advisory Committee on Safety, Hygiene and Health Protection at Work.[18] Both types can, however, also remain without any impact on the Commission, as happened to both the expert committee Aeronautics Task Force and the regulatory committee on Transgenic Maize.[19] Influence is clearly dependent on much more than formal powers and particularly on the formation of consensus, the creation of favourable conditions and the application of special techniques, as mentioned above.

COUNCIL WORKING GROUPS

The expert committees also make draft texts for the secondary legislation, which is the source of less than 15 per cent of EU law. The Council, acting through one of about ten specialised Councils, finally decides upon this amount, in co-decision with the Parliament or not. It also frequently has to consult the two Grand Committees: the Economic and Social Committee and the Committee of the Regions. With one exception the expert committees have no different challenge of influence on this route of legislation. They must produce a sufficient consensus and meet the four conditions of influence. But the fourth condition of low complexity is frequently absent here. The draft text leaves the domain controlled by the Commission and has to find its way to the Council. If it falls under co-decision and/or if it is also politicised by one of the two Grand Committees, the complexity is even higher. Nevertheless, the observation has been made that in most cases of secondary legislation the final decision as published in the Official Journal is largely identical to the draft text coming from the Commission.[20] The Council, always having the final word, apparently only seldom has the decisive word.

In daily reality it usually says no word at all. The work-floor of the Council is Coreper, the body of the Permanent Representations, which, with a total manpower of around 850, is understaffed. The real work, therefore, is done by its 300 or so working groups, composed mainly of national experts and chaired by somebody from the member state chairing the Council.[21] Their main task is to consider, on behalf of the Council ministers, the political acceptability of any draft text. The main criterion for this is the decision rule applicable to the dossier, particularly that regarding decisionmaking by unanimity or (qualified) majority. If a working group comes to the conclusion that a text is acceptable, it puts a roman-I mark on it. Coreper checks this and if it agrees, as it usually does, it gives it an A-mark. In its next meeting the Council in charge (or, if needed, another one) rubberstamps all these A-dossiers in one minute. Quantitative research on the Agricultural Council reveals that about two-thirds of all points on the

Council agenda are such A-points, decided upon without any discussion.[22] Most of these (60 per cent) regard legislation. The remaining one-third of the agenda (B-points) are largely (61 per cent) left undecided. The ministers discuss and quarrel about them and, subsequently, those attending from Coreper, the Commission and the Council's Secretariat-General try to construct a more acceptable text for the next Council meeting, hopefully to be adopted as an A-point then. Taken all together, the Council itself really decides on 13 per cent of all points of the agenda.

The composition of the working groups is formally representative for the national governments. As their watchdogs, the members have to check the acceptability of a draft text and they do so by creating I-dossiers. In practice, the working groups act in a highly sectoral manner, as they are designed to do; their members are generally representatives of a national policy domain. It is up to the mechanism of national co-ordination whether the members voice more than sectoral preferences or not. For most countries the negative answer prevails, as that mechanism mainly regards the B-points left for the Council.[23] The members do not even have to belong to a ministry of their national government. In federal countries like Germany, Belgium and Spain they increasingly and sometimes, as in the German case, even largely come from the regional governments. Small countries like Denmark and Austria set a new trend by recruiting members for the working groups from private interest groups at home. In a small country these private groups may possess the best experts and be the major stakeholder.

The influence of a working group, indicated by its production of I-marks, is most dependent on its capability to form a consensus being sufficient to meet the decision rule, which as Salomon's sword hangs above the table but is seldom drawn. An undisputed status of the members as representative experts, an interactive shuttling of opinions, and a strategic position of a working group further this influence. Two complexities, however, can discount it. One is the smouldering and sometimes open competition from other working groups, having their own specialised Council and domestic stakeholders, which may fear the accomplishment of an I-point. The other is the position of the Commission, by Treaty holding the exclusive monopoly of legislative proposals for Pillar I. If it considers the final consensus at Council level as conflicting with its proposal, it can withdraw this and thus exert veto power. In addition, the smartest interest groups acting through their members also apply the special techniques of parachuting politically skilled experts, providing them with support and realistic instructions and engineering overlapping memberships.

A popular belief again is that working groups and secondary legislation on the one hand and comitology committees and delegated legislation on the other, stand for the difference between high and low politics.[24] However, an objective criterion to assess the relevance of the content of legislation does not exist. The status of the people ultimately involved, namely politicians versus officials, has little to do with the relevance of content. Most secondary legislation primarily settles only the framework or the cadre for further common decision-making, particularly by defining its procedures, authorised bodies and deadlines. Then the Council decides to delegate the so-called implementation to a comitology committee, an agency or the member states. For example, in the field of labour conditions, in 1989 the Social Council adopted the Framework Directive, empowering the aforementioned advisory committee to produce almost 40 directives. These contained the substantial issues, considered by the trade unions and the employers

as the really relevant ones.[25] The devil or the saint is usually not in the framework, but in the detail made by experts at the EU work-floors.

THE PHENOMENON OF IN-SOURCED EXPERTS IN RE-APPRAISAL

Expert and comitology committees and working groups are frequently highly influential in framing and making legislative texts acceptable for signature by an official on behalf of the Commission's College or the Council. Of course, no meeting of experts is always influential. The formation of consensus and the conditions of influence are variables and to some degree can be manipulated for pushing or blocking legislation. The phenomenon is not exceptional for its discretionary and delegated characteristics. In the national governments, too, expert-like officials usually act as the unelected legislators writing the texts for parliamentary ('secondary') and delegated legislation, which are only formally signed by a person or body in a position of responsibility.[26] In most countries the volume of national delegated legislation is even higher than the 85 per cent at EU level. The EU phenomenon is, however, very different because of its proportion and composition of in-sourced experts acting as unelected legislators. At national level, the people framing and making legislation are largely part of the government administration and its agencies and not part of private interest groups. At home, all private groups can, of course, lobby their governments informally and make the binding decisions factually, but they usually have to operate from outside. In northern Europe, however, interest groups from labour and management frequently also hold a semiformal position of consultation, and in southern countries like France, groups from management can even have a formalised status within the administration. Notwithstanding these national variations, the EU phenomenon of in-sourced experts is exceptional for both the proportion of experts being in-sourced and the composition covering private groups.

Both exceptions can be seen as normal under the circumstances of EU legislation.[27] The EU is full of irritating differences, to which common legislation is considered an adequate response. The politicians in the Council and Parliament are hardly capable of settling all the specific issues or doing more than setting frameworks by secondary law. The Commission, having to prepare this and to make the delegated laws subsequently, is clearly understaffed. In order to manage this excess overload it has no alternative but to recruit volunteers. Like every government it is dependent for much of its effectiveness on expertise and support and thus welcomes experts representing stakeholders. These experts can reduce a conflict into specific questions of definition, evidence, feasibility and the like and search for acceptable solutions. As stakeholders, they are also more prepared to volunteer, because this gives them a low-cost channel to monitor and, ultimately, to influence EU legislation. The Commission likes them as they represent the pluralism of the EU and provide a low-cost mechanism for settling issues in a rational and acceptable way.

The exceptional phenomenon has three positive functions for the legislative integration of the EU. First, it provides the member countries and their civil organisations with an extensive bottom-up linkage system for participation in EU legislative affairs. 'Brussels' is not an alien platform, but one where they can sit around the table and fill

blank paper for legislation. Participation is not limited to the national administrations, but also open to other parts of the pluralistic societies, such as regional governments and private interest groups. Second, it furthers the acceptance and legitimacy of the legislative outcomes, as the stakeholders themselves have been part of the input side and the throughput process of EU legislation. Even an undesired outcome can be acceptable as it results from a fair and open game. Third, the import of many different stakeholders makes the EU more representative for the pluralistic member countries. The experts competing with each other enhance the discursiveness of EU decision-making, not only on general issues such as food safety and workers' councils, but also on specific ones such as the definition of chocolate and the cage-size for a laying hen.

Some negative functions, weakening EU integration-by-legislation, can be identified too. First, the in-sourced technocrats acting as unelected legislators may undermine the position of the democratically elected politicians and ultimately erode the electors' acceptance of legislative outcomes. Second, the experts, usually having to operate behind closed doors because open doors seldom produce consensus, may evoke distrust among the outsiders for the lack of transparency and accountability and ultimately for the outcomes. Third, the experts representing their interest group inside a committee or working group may further their selfish interest at the cost of the so-called general interest. The two first-mentioned risks are, of course, not EU-specific. The tension between technocracy and democracy and also the distrust for the 'unseen hand' of legislation exists at the national level as well. Only the third one is typical of the EU. In large numbers people representing all sorts of interest groups sit around the table of legislation and try to promote their own interest. But since they are deeply divided and competitive, they can seldom fully score their interest and they have to compromise.

The various functions can receive different evaluations, dependent on some higher value. For example, people preferring national sovereignty and thus opposing further EU integration will have negative feelings about the positive functions and, if hoping for some disintegration, may have positive ones about the negative functions. Most people, however, clearly support the positive functions of better participation, legitimacy and representation, even if these are seldom realised perfectly in practice. In 1999 the Commission published its programme on EU Governance, aimed at better participation, legitimacy and representation, with special attention to the role of in-sourced experts. Most people also tend to be critical about the negative functions. In the 1990s especially a lot of criticism was levelled, particularly from the side of the Parliament, at the risks of technocracy, lack of accountability and selfishness. By early 2000, most of this criticism had already faded away. In June 1999 the Council decided to strengthen the position of the EP and ordered the Commission to publish an annual report on the workings of comitology.[28] The ongoing proliferation of these committees and the widening of their membership furthered both the participation of previously excluded groups and control over selfish behaviour. It is noteworthy that all criticism was levelled only at comitology and not the expert committees and working groups and thus reflected a formalistic attitude rather than an empirical understanding.

The phenomenon of in-sourced experts may be accredited endurance for the near future. The only alternative is the build-up of a big public bureaucracy in Brussels, such as exists in the national capitals. But large numbers of EU civil servants replacing the in-sourced experts may weaken the positive functions and maintain the two first-mentioned

negative ones. However, national governments still oppose the build-up of such a big public bureaucracy and, as long as they do, the EU system of legislation will be dependent on volunteering experts. The positive functions of this ingenious system can be considered almost as a guarantee of its continuation. The negative sides, as far as have been politicised recently, have led to awareness and some measures. No democracy can operate without technocrats. If they are not available inside the government system, they have to come from outside. If they can not be paid in full, they have to be volunteers. If their behaviour is underhand and self-interested, they can best be controlled by as many possible competing stakeholders, making them accountable and altogether turning selfish interests into a more general interest. The channel of influence they gain is for the EU less a cost than a return, as long as the committee system remains to develop into an increasingly open and competitive system, as it currently does.

NOTES

1. D.Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965), pp. 74–5.
2. G.Azzi, 'The Slow March of European Legislation: The Implementation of Directives', in K.H.Neunreither and A.Wiener(eds.), *European Integration after Amsterdam* (Oxford: Oxford University Press, 2000), pp. 52–67; F.Franchino, 'Delegation and Constraints in the National Execution of the EC Policies: A Longitudinal and Qualitative Analysis', *West European Politics*, Vol. 24, No. 4 (2001), pp. 169–92.
3. E.Vos, *Institutional Frameworks of Community Health and Safety Regulation* (Oxford: Hart, 1999), pp. 117–18.
4. Many observations and findings are based on our data analysis, case studies and interviews, reported in our writings mentioned below.
5. A.Fallik(ed.), *The European Public Affairs Directory* (Brussels: Landmarks, annually), for example p. 252, edition 2000.
6. M.van Schendelen(ed.), *EU Committees as Influential Policymakers* (Aldershot: Ashgate, 1998).
7. R.van Kippersluis, 'The Waste Management Committee', in Van Schendelen (ed.), *EU Committees*, pp. 47–67.
8. See Introduction to this volume, particularly Figure 1.
9. See P.Gray, 'The Scientific Committee on Food', in Van Schendelen(ed.), *EU Committees*, pp. 68–88, and Vos, *Institutional Frameworks*, p. 155.
10. G.Buitendijk and M.van Schendelen, 'Brussels Advisory Committees', *European Law Review*, Vol. 20, No. 1 (1995), pp. 37–56, and R.Dogan, 'A Cross-Sectoral View of Comitology', in T.Christiansen and E.Kirchner(ed.), *Committee Governance in the EU* (Manchester: Manchester University Press, 2000), pp. 45–61.
11. See, for general readings, R.Pedler and G.Schaeffer(eds.), *Shaping European Law and Policy* (Maastricht: EIPA, 1996); Van Schendelen(ed.), *EU Committees;* C.Joerges and E. Vos(eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999); Christiansen and Kirchner, *Committee Governance in the EU.*
12. See, for these figures, the Commission, *Report on the Workings of the Committees during 2000,* OJ 2002/C 37/2. Because the Council is not successful in controlling comitology and, specifically, in coming to a valid vote on time, some see a sort of democratic deficit here. See A.Toeller and H.Hofmann, 'Democracy and the Reform of Comitology', in M.Andenas and A.Türk(eds.), *Delegated Legislation and the Role of Committees in the EC* (London: Kluwer, 2000), pp. 25–50.
13. Van Schendelen(ed.), *EU Committees;* G.Schaefer, 'How do Comitology Committees Work?: An Insider Perspective', in G.Schaefer *et al.*(eds.), *Governance by Committee: The*

Role of Committees in European Policy Making and Policy Implementation (Maastricht: EIPA, 2002).

14. C.Demmke, 'The Secret Life of Comitology', *Eipascope*, Vol. 3 (1998), pp. 14–23.
15. M.van Schendelen, *Machiavelli in Brussels: The Art of Lobbying the EU* (Amsterdam: Amsterdam University Press, 2002).
16. M.Egeberg, Transcending Intergovernmentalism? Identity and Role Perceptions of National Officials in EU Decision-Making', *Journal of European Public Policy*, Vol. 6, No. 3 (1999), pp. 456–74; G.Schaeffer *et al*., The Experience of Member State Officials in EU Committees', *Eipascope*, Vol. 3 (2000), pp. 29–35.
17. M.van Schendelen, 'EU Committees: Influence Counts More Than Legal Powers', in Pedler and Schaeffer(eds.), *Shaping European Law and Policy*, pp. 25–38.
18. See Gray, 'Scientific Committee on Food'; and H.Daemen and M.van Schendelen, 'The Advisory Committee on Safety, Hygiene and Health Protection at Work', in Van Schendelen (ed.), *EU Committees*, pp. 129–47.
19. See, respectively, D.Hickie, The Aeronautics Task Force', in Van Schendelen(ed.), *EU Committees*, pp. 89–108, and K.Bradley, 'The GMO Committee on Transgenic Maize', in Van Schendelen(ed.), *EU Committees*, pp. 207–22.
20. I.Bellier, 'The Commission as an Actor', in H.Wallace and A.Young(eds.), *Participation and Policy-making in the European Union* (Oxford: Clarendon Press, 1977), pp. 91–115; point made at p. 110.
21. J.de Zwaan, *The Permanent Representatives Committee* (Amsterdam: Elsevier, 1995); E. Fouilleux, J.de Maillard and Andy Smith, 'The Role of Council Working Groups in the Production of European Problems and Policies', in Schaefer *et al.*(eds.), *Governance by Committee*.
22. M.van Schendelen, 'The Council Decides: Does the Council Decide?', *Journal of Common Market Studies*, Vol. 34, No. 4 (1996), pp. 531–48, and Vol. 35, No.l (1997), p. 171.
23. M.van Schendelen(ed.), *National Public and Private EC Lobbying* (Aldershot: Dartmouth, 1993), and Van Schendelen, *Machiavelli in Brussels*, chapters 3 and 7.
24. For example, N.Nugent, *Government and Politics of the EU* (London: Macmillan, 4th edn., 1999), p.257.
25. Daemen and Van Schendelen, 'The Advisory Committee on Safety, Hygiene and Health Protection at Work'.
26. T.Bergman *et al.*(eds.), 'Parliamentary Democracy and the Chain of Delegation', *European Journal of Political Research*, Vol. 37, No. 3 (2000), pp. 255–376 (special issue).
27. For this following discussion see M.van Schendelen and R.Pedler, 'Are EU Committees Influential?', in Van Schendelen(ed.), *EU Committees*, pp. 277–94, and A.Liberatore, 'Democratic Expertise and Establishing Scientific Reference Systems', report of the Working Group (Group 1B) for the European Governance project, May 2001.
28. The Annual Report 2000 itself shows the political sensitivity of the matter. It was ordered by the Council in 1999, but 'due to internal discussions' (spokesman) inside the Commission published in February 2002. It presents the facts of comitology for that year only at aggregate level, thus making it impossible to get a precise and detailed insight.

Elected Legislators and their Unelected Assistants in the European Parliament

KARLHEINZ NEUNREITHER

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THE EUROPEAN PARLIAMENT AS A LEGISLATOR: AN EMERGING FUNCTION

If there are any elected legislators in the EU, they are certainly found in the European Parliament (EP). Here, the relationship between legislators and those who assist them is different from that in other EU institutions and touches core questions of the democratic system, above all of political representation. While exploring this issue we should keep in mind, however, that parliaments fulfil many different functions and legislation is just one of them.[1] As far as the EP is concerned, only over the last ten or 15 years has its legislative role become its principal prerogative in the power-sharing of the EU institutions: legislation was rather a late-comer for an institution which has its origins in the 1950s. This time dimension is important, as we shall see.

But let us first look at the present: how legislation is handled within the EP, which procedures prevail, and which phases of the process are important. We will then briefly analyse the various services the EP puts at the disposal of the MEPs, and what external sources should be considered. Finally, we propose to evaluate our findings and mention some windows of possible evolution.

HOW THE EP LEGISLATES

The internal structures and procedures that shape the EP's participation in the legislative process are deeply rooted in its history. In the early days of the European Coal and Steel Community (ECSC) assembly (when legislation was not even mentioned and the treaty spoke only of 'supervisory powers' of the Parliament)[2] a system of standing committees was introduced and the function of a 'rapporteur' created. The basic concept, common to most continental parliaments, is that plenary debates and decisions should, as far as possible, be prepared by standing committees. One committee is the committee 'responsible' for a given matter, with other committees sometimes 'asked for an opinion'.

Only the responsible committee presents its findings to the plenary, in the form of a report that includes a draft for a concluding plenary decision; the other committees are restricted to giving an opinion to the main committee, asking to take it into account in its report.

In this two-tier structure, the rapporteur is most important as the link between the preparatory stage of the committee and the final one of the plenary. Not only does he 'report' the findings of the committee to parliament as a whole, as the name indicates; he is responsible within the committee, from the very beginning, for a given subject. This is one of the outstanding functions in a parliament, though its importance varies, of course, with the salience of the subject. In the 'old', non-elected EP, committees voted on the whole report and the annexed draft resolution; this gave more weight to the written presentation by the rapporteur, but was very time consuming. After the Single Act in the 1980s, and the corresponding increase in legislation, things were changed: committees now vote just on a draft resolution, and the rapporteur adds an 'explanatory statement'. And legislative reports are now focused on the draft legislative text itself, which is the only one put to a vote. The legislative proposal may be accepted without changes or rejected as a whole, or (most commonly) it may be presented to the plenary in an amended form. This concentration on the legislative text, and especially on amendments, has an impact, as we shall see, on the various phases of the procedure.

Before we approach the question how to become a rapporteur and how he chooses his assistance, it is useful to present some quantitative evidence: how many reports are discussed and which categories of reports come into focus? Table 1 gives figures from 2001. Of primary interest are legislative reports, which result in a parliamentary decision in the form of a resolution; in addition there are non-legislative reports and other subjects which may also take the final form of a resolution or of a decision.

In 2001 the EP plenary voted no less than 714 times on a final text, legislative or not. This equates to about 40 decisions or resolutions for an average part-session in Strasbourg or Brussels. This number alone underlines the fact that the EP has become a voting machine rather than an arena for discussion, especially if we keep in mind that numerous votes on amendments usually take place before a final text is established. As far as legislation is concerned, the large part of consultations (190) may astonish: here we have many agricultural reports, some of them important, but many quite routine. The 'opinion' given by the EP in this category is the original, weak form of Parliament's participation in legislation—the Council alone is responsible for the final decision and it can (and often does) disregard

TABLE 1

EP PROCEEDINGS IN 2001—RESOLUTIONS AND DECISIONS ADOPTED

Part session	Consultations (single reading)	Co-decision procedure			Assent	Other opinions	Budget questions	Own initiative reports and resolutions			Misc (2)
		Readings						(1)			
		1st	2nd	3rd				A	B	C	
Jan. I	6	1	2			13	1	8	5	6	1
Jan. II	3	3		4		3					
Feb. I	17	8	4	2		3		2	2	10	
Feb. II	7	3				1	1	2			1
March	9	4	4	1		6		4	5	10	
April	11	5	2	1	1	4	13	1	6	8	
May I	5	2	1		1	1		2	1		4
May II	9	8	7	1	5	8	2	1	5	7	
May III	13	3		2		2		2	1		
June	22	10	5		1	4		2	1	9	
July	6	12	2	2		5	4	6	3	9	
Sept. I	9	7			1	18		6	2	9	
Sept. II	3			2		3		3			1
Oct. I	9	1	2	2	1	16			4	9	1
Oct. II	25	5	7			6	7	4	3		
Nov. I	10	6	1	2		5		3	5	5	2
Nov. II	10	5	1		1	2	1	1	3		
Dec. I	16	2	13	3	5	12	3	4	6	9	1
Dec. II											
Total	190	85	51	22	16	112	32	52	53	91	10

Notes:
1 This column includes: A: Reports; B: Resolutions; C: Urgent subjects.
2 Miscellaneous decisions and resolutions.
Source: General Report on the Activities of the EU 2001, Chapter IX.

parliament's opinion. Next comes the co-decision procedure, the much more powerful prerogative, introduced by the Maastricht and improved by the Amsterdam treaty, where the EP is on equal footing with the Council. The procedure consists of a first reading (85 cases in 2001), generally a second one (51),[3] and sometimes even a third one (22). These second and third readings are generally handled by the same rapporteurs as the first. The assent procedure—which resembles ratification in national parliaments—comes next (16). A separate chapter concerns the budget (22) where we find the annual general budget, possible additional ones and other budgetary questions. 'Other opinions' rank very high (112). This column covers mainly opinions on Commission reports or communications of a different nature, including a number of pre-legislative documents.

The rest is non-legislative and therefore of no direct concern to our subject. It is interesting to note, however, how much the possibility of 'own-initiative' reports has been reduced via strict internal rules—only 52 were presented in the year under review. Before the dramatic increase of legislative work in the late 1980s, these reports were more numerous than any other category. Outstanding contributions like the Spinelli draft constitution of 1984 were presented under this category, which has now become quite marginal. On the other hand, urgent questions (91) which are directly introduced by the political groups and do not have to pass any filtering by a committee are given considerable space. Some of these questions, hastily prepared, are only presented to catch the interest of the media.

As we have seen, only the committee responsible can present a report to the plenary. How is this workload allocated? The EP's website reports figures for adopted reports by committee for any given period. If we just take the first half of the present legislative period (July 1999—end 2001) we find a heavy load for the Committee on the Environment, Public Health and Consumer Policy (144 reports for this period), followed by the Committee for Industry, External Trade, Research and Energy (86), the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (83), and the Committee on Regional Policy, Transport and Tourism (80). At the lower end of the scale are the Committee on Women's Rights and Equal Opportunities (17) or the one on Petitions (10). Even if we take into account the differences in size ranging from 69 members for the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy (74 reports) to the Committee on Petitions (28 members, 10 reports), or the Committee on Budgetary Control (21 members, but 44 reports), it is evident that the chance for an individual MEP to become a rapporteur during a legislative period varies considerably from committee to committee.

PARLIAMENTARY PROCEDURES: STAGES OF A LEGISLATIVE PROPOSAL

Before we take a closer look at parliamentary assistance, it is useful to identify the various stages taken by legislation in the EP: responsibilities are split up between the President, the Conference of Presidents, the committee responsible, possibly other committees asked for an opinion, political groups and the plenary. Since the European Commission holds the monopoly to initiate legislation, each draft directive or regulation takes the form of a Commission proposal that is sent to the EP at the same time as to the

Council. With the reception of such a document, the formal internal procedure within the EP begins. The President selects one of the permanent committees as responsible, and possibly one or more others are asked for an opinion. But how does the President know which committee is the most concerned? First, there is a list of competencies for each committee, annexed to the internal rules, which gives in most cases sufficient indication. Previous legislation in the same matters may constitute an additional guideline. But, even so, some drafts cover different policy areas and it is sometimes a matter of political judgement how to decide. Conflicts between committees are not impossible, and if they cannot be settled by the Conference of Presidents, the EP plenary must decide.

Once the legislative draft has been allocated to a committee, further steps are required before actual legislative work can start. Formal necessities are verification of the legal basis, in respect of the rules of subsidiarity and proportionality, and of human rights. More practically, the committee has to decide which procedure to follow: the normal one, which consists of the appointment of a rapporteur and production of a report, or a simplified one. To reduce the workload of plenary, Parliament has experimented with several schemes. The most radical one is that a subject is dealt with by the committee alone and is not submitted to plenary at all. Some national parliaments, like the Italian one, apply this procedure regularly. In the EP, however, this solution has not been popular. The most obvious reason is that the EP, which is composed of MEPs from more than 100 national or sometimes regional parties, is much more heterogeneous than any national assembly and deliberation in the plenary is easier to follow than a decision in one of the 17 committees where a national party might not be represented. As a consequence, this option was deleted in the last modification of the EP's Rules of Procedure (Provisional edition of July 2002). But less radical solutions are maintained: the committee responsible may decide, after a first internal discussion, that the legislative proposal be approved without amendments. This saves not only time but has an additional advantage: no rapporteur need be appointed by the committee, and the committee chair will undertake the formal presentation to plenary.[4]

If the committee responsible has decided to follow the normal procedure, the first major step will be to decide which of its members should be the rapporteur.[5] The rapporteur is the central person in the handling of a legislative matter. As a rule, the rapporteur is only appointed when the respective proposal has been tabled. But there are a few exceptions. Committees may designate some of their members to follow closely matters listed in the current annual legislative programme, even before draft legislation has been elaborated. Such a designation anticipates formal nomination as a rapporteur. Second, a new act of legislation may have been preceded by a Commission white book or similar document of general orientation. We have seen, when looking at the workload of the EP in 2001 that these documents constitute a considerable segment. In other words, the pre-legislative phase may influence the actual appointment of a rapporteur.

Political groups, however, are crucial at this stage. Their main interest is not to make sure that the best qualified committee member becomes rapporteur (which would be useful in counterbalancing the tremendous expertise which has already gone into any legislative draft) but to get a fair share for themselves out of the total number of rapporteurships. To this end, various informal systems have been established to distribute the respective appointments among the groups. Such systems are operated by political group officials, under the more or less distant oversight of their respective 'co-

ordinator'.[6] Some of these systems just consist of a list of expected proposals, others weight them and give more points to important issues. The objective is always to get an agreed percentage for your own group. As one can imagine, the actual proposal for appointment will be influenced by many factors, including the one of 'justice'—that is, to give a fair chance to all members, at least to the more active ones, to become a rapporteur.[7]

Such systems do not maximise the expertise of the average rapporteur—quite the contrary. So can we expect that a rapporteur has sufficient abilities, both as an expert and a political manager, in order to fulfil his role? For a number of reasons, the average rapporteur is not likely to be an expert on the subject for which he has been assigned. First, election as an MEP was, in most cases, not based on criteria linked to the subject; second, membership in a given committee will not always reflect the MEP's own preferences; and, third, the given subject is perhaps of minor interest within the policy range of the committee. But what about the second quality, that of a political manager? Here we come to the heart of the matter. We do not expect a national minister to be a professional in his field before he takes up office (though this would sometimes help). What we expect is that the minister not be dominated by the professional bureaucracy which surrounds him, and that he create a balance between expertise and his own political responsibility. In some national governments, the minister is assisted in this task by a political staff of his choice, his 'private office', or 'cabinet' in French; other governments do not have this tradition and the minister has to rely almost completely on the 'non-partisan' advice given by permanent staff.

In most national parliaments, there is a clear distinction between rapporteurs who belong to the majority and those who are from the opposition. The first ones can largely rely on the expertise of the governmental apparatus; indeed they are usually expected to do so. The opposition, on the other hand, cannot count on comparable resources. The EP does not exist in a majoritarian system—there is no clear 'government' and 'opposition' in the EU.[8] In other words, an EP rapporteur cannot count on the 'majority bonus' of expertise: he is, seen from the executive, always in the position of an outsider, of a 'hidden opposition'. Hence the quality of his assistance is a key element of the legislative role of the EP.

PARLIAMENTARY ASSISTANCE IN THE EP: A 'NON-PARTISAN' PUBLIC SERVICE?

Parliamentary assistance within the EP can be of three types: assistance by one of the services of the EP itself, assistance by staff of a political group, or assistance by the MEP's personal staff. The first of these categories was for many years clearly dominant and its position has only gradually changed since the mid-1990s. What are the reasons for this?

In liberal democracies, we find two archetypes of administrative systems: one is based on the idea of an impartial professional service, as far away as possible from political interference. The other is linked more to a certain conception of majority rule and allows those in power to replace adherents of other political orientations with their own followers. The first one is heavily rooted in European systems, while the second one, in

the form of the 'spoils' system, is generally assumed to exist in the United States. As far as the EU is concerned, its administrative system was built according to French traditions and conceptions. The backbone of this system is recruitment on the basis of general competition, high degree of tenure, and a broadly objective promotion system with a tendency to favour seniority over merit.

But establishing rules is one thing; to become a truly non-partisan and respected service quite another. A number of factors contributed to such a development. Before the first EP elections in 1979, the chamber was an unelected assembly composed of delegated members of the national parliaments who had to split their time between their original mandate and the EP (and in some cases also the Council of Europe). This provided for considerable independence of the secretariat during MEPs' absence and for 'desk officers' to become experts on legislative files, with little chance for the members to acquire comparable knowledge. Direct elections doubled the size of the EP, with most MEPs now full-time. Gradually, the more active among them now had the chance not only to acquaint themselves with the difficult machinery which is the EU, but to become proficient in policy matters as well, mainly through their work in a committee of their choice. Budgetary questions were where such developments occurred first, but from the second half of the 1980s, there was an increasing number of issues in other committees as well on which at least some MEPs had acquired considerable expertise.

During these years, the relative independence of the EP secretariat was strengthened by the security of tenure of its senior officers. As late as in the mid-1990s, out of nine A-1 posts (the highest bracket of the Secretary-General and Director-Generals) no less than six had begun their career as junior officers in the EP back in the late 1950s or early 1960s. Due to the system of national balance, there was only limited direct competition or jealousy in this group.[9] Careers tended to be rather slow—which had the advantage that people were integrated step by step into this evolving system and had time—except for newcomers following the various enlargements—to internalise the unwritten rules that are important in such a service. Certainly, there were deficiencies in this set-up, including a lack of mobility between services. But in general, and against the odds in a highly politicised environment, a kind of independent non-partisan service emerged.

Which parliamentary services can provide direct legislative assistance? There are three departments which can be singled out: DG II (committee secretariats), DG IV (studies), and the Legal Service. In addition, DG III (information) is concerned marginally, since it is responsible for the drafting and distribution of summaries of meetings to the public.

The Legal Service is a late-comer in this game; it was created in the early 1990s in order to increase the EP's capacities in judicial matters. Legislation is only a part of its activities. The service is composed of 22 'A' grade staff and a team of legal linguistic revisers.[10] After one deducts the time-consuming functions of representing the EP in lawsuits and similar matters, not very much time is left for the Legal Service to provide specialised legislative assistance on peculiar subjects. So this service-in addition to the standard verification of legislative texts before their final signature—may be called in for occasional help, but rarely provides substantial assistance for rapporteurs.

DG IV, by contrast, is an old-timer. Under various headings it has survived all kinds of restructuring plans. The secret of its survival may be that if you abolish it, you increase the weight of its immediate competitor, DG II, so much as to put out of balance the whole internal structure of the EP secretariat. Research and documentation are important fields,

and the EP would have gained considerably if a convincing strategy had been undertaken for the development of this service. The Legislative Research Service of the US Congress was considered, by those who favoured evolution in this direction, as a possible model. Instead, for many years no far-reaching concepts were forwarded and many DG IV officials wasted time assisting committee meetings without having a real function. When, finally, in the early 1990s, plans for a comprehensive parliamentary documentation centre were forwarded, it proved to be too late. The necessary space in the new buildings in Brussels was reduced step by step, and MEPs now preferred to give priority to the new information technologies for their own direct use. Still, DG IV has about 50 'A' grade officials, which could constitute a considerable workforce for legislative assistance, especially where reports are linked with basic questions and where in-depth studies would be of help. But one gets the impression that this service tries to chase too many hares and to please too many customers, which also leads to a dispersal of its financial means (€750,000 annually for external studies). Thus, direct assistance of rapporteurs is infrequent.[11]

This leaves us, as far as the EP's own services are concerned, with DG II, which provides secretariats for committees and delegations.[12] The overall size of this service is not impressive—only about ten per cent of the EP's whole staff work there. But this includes about 150 A grade officials, which represents almost 40 per cent of this category. Most of them work directly in the secretariat of a committee—which may vary in size from a maximum of 11 to a minimum of three grade A officials, taking into account both the membership of the committee and its workload. Thus, the largest committee (69 full members and about the same number of permanent substitutes, that is, a total presently of 139) though not the most active one as far as reports are concerned (74 reports from mid-1999 to the end of 2001) has eight A grade officials, including a head of division, at its disposal, a relatively large, very active committee like the Environment Committee (144 reports), nine grade A officials, one of the smallest of the present 17 standing committees, the one on petitions (40 members and permanent substitutes) with a low output of reports but an intensive workload due to the individual petitions to handle, five grade A officials. The Committee on Women's Rights and Equal Opportunities (66 members and permanent substitutes; 17 reports) is the most modest one, as far as staffing is concerned: only three A grade officials work there.

DG II has become the pivotal element in providing legislative assistance within the EP Since most DG II officials—with the exception of a few internal horizontal units,[13] and the services concerned with interparliamentary relations—are attached directly to a committee secretariat, this implies that the actual legislative assistance takes place there. The internal structure of DG II is largely non-hierarchical. The Director-General assumes overall co-ordination, the role of the directors has always been vague, so direct management is provided by the head of division of a committee. If the latter is clever—and they usually are—he can shield himself to a large extent from hierarchical influence by hiding behind his parliamentary authorities. This may lead to self-centredness of a head of division who knows that committee chairmen usually defend—rightly or wrongly—their own secretariat. In any case, all attempts at internal reforms by creating mobile 'task forces' within DG II, which would have reduced the staff assigned directly to committees, have failed. A functional repartition between DG II and DG IV to the same effect was not realised either, due to jealousy between services.

Legislative assistance in this sector follows practices that have developed over the years. When a rapporteur is appointed he can freely choose which assistant, if any, he would like to have. A minimum, one would assume, is to have one contact person within the committee secretariat for matters of procedure and timing, including respect for delays for translation, and so on. But many rapporteurs wish to have someone who gives them advice, assists them in contacts with the Commission, and, possibly, helps in drafting the report, or even drafts it for them. This person must be competent and trustworthy. Competence can be checked. Often, the rapporteur will have seen this official assist other rapporteurs and will have had some feedback from them. Trust is a much more critical notion. The MEP has political opinions and a political mandate, while the official, though formally in a non-partisan public service, generally also has personal political preferences. To put it crudely, how does one, as a rapporteur, trust someone who may have a very different political orientation?

This is part of the general question concerning the relationship between a professional career civil service and political mandate holders. A national minister has, in most systems of government, little choice but to co-operate with senior officials of his ministry. In the EP, the rapporteur selects his assistants himself, and he can choose between various options—some of whom are more expert-orientated and non-partisan than others. If he co-operates closely with someone from the committee's secretariat he opts for professionalism, assuming that possible personal differences of political opinions will not hamper loyal services.

In other words, if the committee secretariats succeed in creating this impression and are generally acknowledged as competent and non-partisan, this proves the existence of a public service model in the EP But how often does the principal assistance for a rapporteur come from within the secretariat? There are no official figures available. In the early 1990s, in connection with discussions on which service should get additional staffing, DG II conducted an internal study and asked all secretariats how many parliamentary reports were assisted, beyond technical and procedural questions, from somebody in their team. The surprising result was well above 80 per cent.[14] The rest was split up between DG IV and external help, including MEPs' own personal staff. The political group secretariats were completely marginalised.

There are no more recent figures available. Insiders agree that direct assistance via the committee secretariats has decreased over the last decade. A rough guess for the main legislative committees might see their involvement now at about 50 per cent. Several factors contribute to this evolution, including the increased availability of documentation and background material, especially via electronic means, and the more focused action of interest groups that have appeared on the scene as voluntary legislative assistants. But still, if we take the above figures—with all necessary caution—as a guide, they would indicate that a habit of co-operation between rapporteurs and officials within committee secretariats has emerged which is quite astonishing in view of the different political cultures involved.

The question might be asked: 'who influences whom in this co-operation?' This is difficult to say. One could assume that there should be an input from both sides, perhaps one more political, the other more administrative-procedural. Many scenarios are possible. For example, the rapporteur may have strong personal feelings about the subject while the staff person is likely to have a tendency to keep in mind how the committee

might react to the draft report. In any case, this co-operation does not take place in isolation: the Commission will follow very closely what happens to their proposal, the rapporteur will be in touch with his political friends in the committee and the group staff, external interests may be forwarded and so on. As a result, co-operation between staff and politician is often more a common learning process influenced by a wider arena than anything else.

POLITICAL ASSISTANCE: PARLIAMENTARY GROUPS AND PRIVATE STAFF

Before turning to external forms of legislative assistance, let us briefly look at the two remaining internal sectors: the political group secretariats and the individual secretariats of MEPs. Each political group of the EP has the right to establish a secretariat, which is funded like the rest of the groups' expenses out of the general budget of the Parliament.[15] Together with other privileges, the chance to have a secretariat has upheld the predominant role of the groups in the EP: something that has sometimes resulted in the formation of rather heterogeneous or 'technical' groups. In the beginning, with rather reduced staffing—in the category of 'temporary' officials,[16] a somewhat lower status than that of a permanent official—organisational tasks prevailed, but with the growing importance of legislation, these secretariats began to follow more closely what happened in the committees. Above all, the activities of their own members during the committee deliberations needed to be co-ordinated and possible amendments prepared, in the name of their political group after adoption of a report in the committee and before its final discussion and vote in the plenary.

But, in addition to this, the group secretariats tried repeatedly to undermine, to some extent, the independent position of the committee secretariats in order to be charged with the legislative assistance of 'their' rapporteurs. Since it can be quite time-consuming and demand expert knowledge to draft a whole report, it was sometimes asked that the EP services—DG II or DG IV—should only provide a kind of background file which the responsible member of the group secretariat would then 'politicise'. All attempts of this kind failed. This was perhaps less a result of a strong opposition from within the EP secretariat than of the preferences of rapporteurs and other senior MEPs themselves. In any case, the secretariats of the political groups, while increasing their role in co-ordination, have not hitherto played a significant direct role in overall assistance of rapporteurs.

The last internal category concerns the private staff of individual MEPs. Each MEP receives a secretarial allowance. He acts as an employer, and the EP services exercise only some oversight in order to make sure that this allowance is not used for other purposes. This staff may be based in Brussels or in the political centre of the respective MEP's activities at home, often his constituency. Some do pure secretarial work, others, including young trainees with a college background, handle political questions like speeches and could be involved more substantially for legislative assistance. There are a number of senior MEPs who use their staff not for direct drafting of reports, but for related functions including the filtering of external sources and their possible impact on

legislative proposals. This strengthens the position of a rapporteur while keeping the option of close co-operation with internal EP services open.

OUTSIDE INDEPENDENT EXPERTISE: SCIENTIFIC AND TECHNOLOGICAL OPTIONS ASSESSMENT

A major problem the EP faces is how to obtain relevant information for its legislative work. The Commission is, of course, a prime source: it has drafted the original proposal and has, to that end, usually held extensive expert consultations. Interest groups may offer advice and national governments may send memos to MEPs from their country. As a result, it is not so much advice *per se* that is lacking, but its independence. If all these possible sources have a tendency to be biased, is there a chance for the EP to have access to more objective and reliable advice?

Questions like this led to the establishment of a mechanism called STOA (Scientific and Technological Options Assessment), administratively attached to DG IV. Its role is to assist parliamentary committees, at their request, in performing their legislative tasks and similar activities, where science and technology are primarily concerned. An annual work programme (budget: €750,000, the same as for general DG IV studies) is established to this end by a parliamentary panel, assisted by a small group of officials. Outside contacts with research and other scientific facilities are channelled via an annual call for expressions of interest, followed by calls for tender for specific projects. Present studies include topical issues like ‘A European Health Card’ or ‘Production capacity of renewable energies in the EU’, but also general questions like ‘Regional structures in applicant countries’ where one might doubt whether additional studies are really needed. This last aspect indicates an inherent weakness of such programmes: interested MEPs can succeed in pushing through projects where an institute they know is particularly specialised and likely to be selected in the end. A rigid filtering process must therefore be applied.

Another difficulty consists in timing, which is important in relation to EU legislation. There are several authorisation procedures for contracts, the most complicated one via public tender (for amounts exceeding €100,000) taking about half a year. If you add the time for the realisation of the project, you are close to a total period of 12–18 months, which means research often takes too long to have an impact on current debates over legislation. Nevertheless, STOA is a necessary instrument for an institution like the EP Improvements might be envisaged which could include speedier procedures and an increased complementarity with the research programme of DG IV.

HEARINGS AND SIMILAR EVENTS

A simple way for tapping external knowledge is to invite experts and listen to what they have to say. In the late 1980s the EP committees discovered this instrument, which has a long tradition in some national parliaments, and became quite fond of it. But the Bureau of the EP, under the pretext of budgetary control, insisted on a centralised oversight based on annual programmes that unduly limited its practical use. Only when procedures were

liberalised were hearings held more frequently. But it is not surprising that in a political institution like the EP, this new instrument also became the object of partisan quarrels: who to invite became the central question, because you could in most cases guess which answers you would get.

The political groups, familiar with the techniques of power sharing, usually achieved a balanced invitation list. Nonetheless, after some time the attraction of hearings diminished. Experts often read lengthy statements instead of transmitting them in advance and just answering questions. Hearings were long, often two days, and became boring except for a handful of specialists. When procedural reforms were introduced, it was rather late, and hearings had lost much of their original attraction. During recent years, an additional difficulty has appeared: committees with a heavy legislative burden, which is increased by the trend towards countless votes on amendments, find that they lack the time for hearings. The Committee of the Environment, one of the first to be interested in hearings, has abandoned them altogether in favour of other models, including smaller informal 'hearings' organised by the rapporteurs under the auspices of their political group, or by the groups themselves. As a result, the formula to bring expert advice directly into the EP has been maintained, but it has lost much of its original flair and has become an element in the struggle between political forces.

'GRATUITOUS' OUTSIDE HELP

While the internal structures of legislative assistance have not changed very much and have proven rather conservative, and while additional elements like STOA or hearings have had limited success, a considerably greater transformation has occurred during recent years in regard to the relations with representatives of all kinds of interest, from classical interest groups, NGOs, large enterprises, to national and regional governments, third countries and others. Here, the emergence of the EP not only as a legislator but also as an important actor in other EU activities has had its most dramatic effects. The EP was marginal to such actors until 12 or 15 years ago, and interest representation has reacted to the evolution of its role only with a certain time lag.

In the growing literature on interest representation in the EU, the EP has been relatively neglected.[17] We know that the volume and the intensity of contacts has grown considerably and that new varieties of interest representation can be observed. Some of these include MEPs who are linked with the Brussels office of large enterprises, or former MEPs who now make a living as 'consultants'. But these are only elements in a picture that needs to be completed. As far as legislation is concerned, it would be interesting to know to what extent these groups have actually replaced other models of assistance. We can develop here only a preliminary hypothesis, requiring further investigation.

Our starting point is the changing character of legislation in the EP. Traditionally, as far as new subjects are concerned, an internal opinion was formed by discussions in the early stages of the procedure, possibly on the basis of pre-legislative documents. When the legislative draft arrived, a general debate took place at committee level, and those participating in it had a strategic advantage in view of the following discussions in their political group. Only after this general orientation during the committee stage was more

precise action considered, mainly in the form of amendments to the Commission's proposal. Now the order has changed, which is reflected in the EP's internal rules. The Commission's proposal is taken as a starting point, and the committee responsible examines whether it agrees to it, whether it wants to amend or reject it. Amendments become, in this trilogy, the most frequent outcome.[18] There are serious complaints that quarrels about amendments have to a great extent replaced a truly parliamentary debate. Some committees occasionally have to deal with 300–400 amendments on one proposal, a nightmare in itself. The committees involved in this resort more and more to electronic voting and several meeting rooms in Brussels have had to be equipped with the necessary installations.

This avalanche of detailed and very precise interventions does not have its predominate origin in the internal EP services; we can detect here the invisible hand of external interests. The members of the committee responsible—and we include here all members, from the chairman, the rapporteur, the shadow rapporteurs for the various groups,[19] the group co-ordinators, and so on—focus their interest on possible amendments, or on arguments to block them. This is a game for which the EP's own services are not well equipped. On the other hand, if you have just a segmented interest to defend, it is easy for an outsider to formulate a few changes in a proposal under consideration. No in-depth background study is needed for this, and no general evaluation of the legislative initiative as a whole. The amendment may even be contrary to the rest of the text; it will then be for the legislator to assure a minimum of coherence.

In this evolution, the committee secretariats run the danger of being reduced to mere notary's offices. They have to put amendments in an order for voting, help the chairman in the difficult task of seeing to it that no contradictory texts are adopted, and register the result for transmission to the plenary. This could lead to a substantial reduction of their classical role of trusted knowledgeable advisers to all members of the committee, above all to the chairman and the rapporteur. It may be that the success story of the EP, which was the origin of the outside interest, now turns against itself.

RECENT PROPOSALS FOR REFORM

The EP has seen more radical changes in its role than any other EU institution. It has evolved from a small club of delegated national MPs, via a period of marked discrepancy between public mandate and a limited role, more recently into an ascendancy not only in legislation, but also in its standing vis-à-vis Commission and Council and public awareness in general. As far as legislation is concerned, these changes include an increase of contacts, both formal and informal, with the Commission and with the Council, mainly but not exclusively in the domain of co-decision procedures. More dramatically, the greater impact of the EP on EU decision-making has made the chamber subject to lobbying of all kinds,[20] with definite effects on its internal use of time due to the resulting increase of amendments. An additional element consists in the largely increased flow of information. As a result, decision-makers have to deal with a much more open choice, and to operate in a competitive market of information, much of it biased.

In contrast to these fundamental modifications, the internal service structure of the EP has been largely untouched. We still have the basic concept of a non-partisan public service that provides assistance to all MEPs in the fulfilment of their respective functions. Inside this structure, the relationship between specific services—DG II, DG IV, and so on—and the group secretariats has also been stable, with a certain evolution of the private assistant sector. The importance of inside assistance has diminished however, and the main danger might be a reduction of the capacity of the EP to steer the legislative process. Is the EP aware of this situation and how might it react? After many years of silence or superficial restructuring models, the Bureau of the EP asked one of its members, vice-president James Provan, to tackle the fundamentals of legislative assistance and to submit proposals for a thorough reform.

Provan submitted his findings late 2001.[21] They distinguished between political and administrative roles, and then explored who could fulfil them. Provan focused his interest on the committee stage, which he sees as the core of the legislative process. Assistance to the committee as a whole, to the chair, to rapporteurs or draftsmen can be broken down, according to him, into four categories:

1. 'technical-administrative' assistance: organisational support for meetings, and the like.
2. 'technical-substantive' assistance: advice on procedures, legal issues, document drafting, and so on.
3. 'research' assistance: background information, options and impact assessment, and others.
4. 'political' assistance: policy definition, political co-ordination within the political group, with other groups, national delegation, party, constituency, and suchlike.

At present, a number of EP services (DG II: committee secretariats; DG IV: research and documentation support; Legal Service; and DG III: information to the outside world), the secretariats of the political groups (advisors attached to committees), individual members' assistants, and finally 'informal' external advisors, lobbies, NGOs, and so on participate and sometimes compete in providing the above functions. How can these resources be reorganised in view of the changing needs of the consumers, the MEPs?

Provan advocated combining what he saw as the strength of the current system—namely a 'belief in the value of high-quality non-partisan secretariat support'—with increasing demands by members for 'quality political support services accountable to themselves, and more immediate and responsive backup facilities'.[22] To this end, he suggested, the internal services of the EP should be reorganised, the roles of the political group secretariats limited, and the staff of individual members considerably strengthened. Committee secretariats would play a much more comprehensive role, and DGs IV and III would be somewhat marginalised. Group secretariats were told that they should concentrate on political co-ordination, but not try to interfere directly in legislative assistance. Instead, the last category, political assistance, should be handled by the personal staff of each MEP, which would have to include at least one qualified person (grade A level equivalent).

There are interesting aspects in Provan's proposals which do not concern our direct subject. We take note that he recognised the existence and the usefulness of a non-partisan public service in the EP which is, as far as legislation is concerned, built around the committee secretariats. He suggested that this centre should be strengthened. Political

groups and their mushrooming number of advisers should reconsider their parameters of possible actions. The main deficit would then lie directly with the official legislators who should be surrounded more solidly by staff who can handle the more political side of legislation.

Unfortunately, this initiative was not endorsed by the Bureau, which concentrated its efforts on the restructuring of internal services. Based on proposals by the Secretary-General, major decisions were taken in March 2003. As far as legislative assistance is concerned the main elements are the following:

1. Abolition of the present DG IV (studies).
2. Integration of the studies/research services of DG IV, including STOA, into DG II (committees and delegations).
3. Splitting of this enlarged DG II in two Directorates-General, one for internal policies, and a second one for external policies.

What is interesting is that the present DG IV research staff will not be attached directly to the committee secretariats, but will remain at the disposal of the directorates in order to form project teams for subjects to be defined by the committees. In addition, the budget for studies will follow this restructuring, being split between committees. In a trial period, €400,000 has already been handed over for the current year to four committees most concerned with the subject.

All this sounds interesting and could be promising if handled with skill. Some aspects still need clarification: if excessive emphasis is put on the rapporteurs and their current needs, the medium and long-term planning of studies might suffer. In addition, if new staff are based at the level of the directorates, in order to guarantee a certain flexibility and the possibility of thematic teams going beyond the competencies of individual committees—which is to be welcomed—then the allocation of funds directly to specific committees might be counter-productive. Finally, the splitting up of the present coherent DG II into a large one for internal policies (covering no less than 15 out of the total of 17 permanent committees, in addition practically all temporary committees, plus the co-decision and budgetary procedures), and a rather minuscule one for external relations (with only two permanent committees, plus the rather marginal delegations) looks rather imbalanced and may create major difficulties of co-ordination. But a new start has been made, and should be given a chance.

CONCLUSIONS: LEGISLATION AND POLITICAL RESPONSIBILITY

Members of the EP have a political mandate that is based on general elections. They are more directly linked with the source of democratic legitimacy, the people, than members of the other institutions. This sharpens the contours of our key question: how to reconcile the responsible exercise of an electoral mandate with the necessity of preparing the legislative decision by different non-elected sources.

We have seen that, as far as the EP is concerned, a number of elements compose the overall picture. First, we have the internal services of the EP, which have grown over a period of more than 40 years into a widely respected, non-partisan public service,

considered by many as a 'strong internal bureaucracy'.[23] The value of these services, which should be strengthened, is that they are trusted.[24] Once this trust is destroyed it is improbable that it could be rebuilt.

In addition, there are the secretariats of the political groups which have been, since their creation, a rather critical observer of this non-partisan service and would have liked to take over some of their more 'political' functions. Then we have the largely unused—in our context—workforce of individual assistants. And, finally, we have the outside world, which offers more and more advice and help, often in the form of legislative amendments, just to be signed and mailed.

The weak point in this conglomerate seems to be the area closest to the MEP, be he a rapporteur, shadow rapporteur, any other member of the committee responsible, of one asked for an opinion, or just an MEP with a general interest in a specific piece of legislation. With all the trust and belief in a non-partisan service it can be assumed that many MEPs think that their capacity to evaluate extremely complex options should be strengthened in their immediate environment, that is, in their own secretariat. Provan took up this point and suggested that each MEP should have at least one legislative assistant of grade A level. If this were realised, a massive additional workforce would be created which would outnumber any of the existing services.

But we should not be horrified by these figures. As far as re-balancing is concerned, Provan might have been on the right track: a revision of tasks of the various internal EP services, a clearer, limited mandate in direct assistance for the political group secretariats, and a decisive improvement directly in the MEPs' offices. However, this will not solve the inherent dilemma of the amalgam of technical-administrative and political functions. Quite a bit of the routine administration of a committee, from agendasetting in a narrow sense, to the order of votes, or contacts with other institutions, involves political elements. On the other hand, the drafting of texts, their handling, their possible impact, can depend, to a large part, on expert knowledge which individual assistants will not acquire easily and at short notice. In other words, the legislative process is a continuum and cannot be clearly split up into various segments. This calls for close co-operation, based on mutual trust, of all concerned.

And whatever is done inside the EP does not resolve the handling of the increasing impact of external sources. Here the EP has to do some basic homework if it wants to avoid a further deterioration of both its committee and plenary system into an all-devouring voting machine. Of course, the EP is an open institution and should not lock its doors. But looking at the Commission, one gets the impression that a relatively successful management of external resources takes place, while in the EP these resources make their presence felt in a somewhat chaotic and non-transparent way. There is certainly room for improvement which would not only help the EP in its internal organisation but would also increase the attractiveness of its plenary sessions and open committee meetings. The function of the legislator, mandated by the peoples composing the European Union, would definitely be strengthened.

NOTES

1. Walter Bagehot was the first to examine parliamentary functions in a pragmatic way. See W. Bagehot, *The English Constitution* (London: Fontana, 1963 [1867]). For him, the support of the government by a parliamentary majority, not legislation, was the most important element. For a detailed research paper on the EP using a functional approach see A.Maurer, *(Co-) Governing after Maastricht: The European Parliament's Institutional Performance 1994–1999* (European Parliament Directorate-General for Research: Political Series, POLI 104/rev.EN, 10/99, 1999).
2. In Jean Monnet's original institutional set-up, there were two executive bodies, the High Authority (later to become the Commission) and the Council, and two of supervision, the Assembly (now the EP) and the Court of Justice. As a consequence, the ECSC Treaty only speaks of 'supervisory powers' (Art.20) for the EP, while the following EEC treaties, including Maastricht, only mention 'advisory and supervisory powers' (Art.107). The Amsterdam Treaty, at least, should have stated explicitly that the EP was by now a legislator. But a more veiled form was chosen, that the EP exercises 'the powers conferred upon it by this Treaty' (Art.189). The terms 'legislation' or 'co-decision' were also avoided and substituted by non-transparent language (Art.192 TEC).
3. If the EP approves the proposal or amends it and the Council agrees to this, there is no second reading (in contrast to the procedure in most national parliaments).
4. See Rule 158. An interesting variation is the possibility that the chairman or the rapporteur drafts amendments supposed to reflect the committee's opinion and circulates them to members for their approval. If one-tenth of the members object, the report has to go back to the next committee meeting. If not, it is considered as having been adopted.
5. EP Rules of Procedure assume that there is only one rapporteur who must be a full or a permanent substitute member of the committee responsible. Occasionally, committees have had two rapporteurs for an important subject, like treaty revisions.
6. A 'co-ordinator' is an MEP who acts as a kind of 'whip' for a political group in a committee.
7. For an interesting analysis, see V.Mamadouh and T.Raunio: 'Allocating Reports in the European Parliament: How parties influence committee work', EPRG Working Paper, No. 7, (2002), www.lse.ac.uk/Depts/eprg/working-papers.htm.
8. This aspect is definitely neglected due to the mainstream approach concentrating on negotiation systems and similar notions. See K.Neunreither: 'Governance without Opposition: The Case of the EU', *Government and Opposition,* Vol. 33 (1998), pp. 419–44.
9. In international organisations with a formal or informal national quota system, mobbing tends to become vertical, not horizontal: you must remove superiors of your own nationality, not those of others, to be promoted. This would be an interesting subject for more detailed analysis.
10. The EP does not publish its establishment plan, which is not an indication of transparency. So we have to rely on its internal telephone list (edition of July 2001) where only existing staff persons are listed, not vacant jobs. Only A grade staff are mentioned, which does not mean that the other categories (grade B, C, or D) contribute less to their service.
11. The author must acknowledge that he was Director-General of DG II for many years and that his views are certainly biased.
12. Interparliamentary Delegations assure relations with countries that are not EU members (this category includes 'Joint Parliamentary Committees' for relations with candidate countries, and 'Parliamentary Co-operation Committees'). They do not take part in the legislative process—even where a closer co-ordination concerning reports on specific countries or areas would be useful—so are not dealt with here.

13. There are small units for legislative co-ordination, for conciliation and concertation procedures, relations with national parliaments, and other questions. In addition, temporary committees (at present six investigating matters linked with BSE, foot and mouth disease, human genetics, community transit, and the Echelon interception system) are staffed by *ad hoc* secretariats.
14. Internal unpublished working document of DG II.
15. In the EP's establishment plan for 2001, there were 3,550 permanent posts (all for its own secretariat), and no less than 635 temporary posts (almost all of them, with a few exceptions, for the political groups). For more information, and a comprehensive presentation of the EP's structures and working methods, the best source is still R.Corbett, F.Jacobs and M. Shackleton, *The European Parliament* (London: John Harper, 4th edn., 2000).
16. Members of the secretariats of the political groups are 'temporary officials' according to the EU staff rules. They do not have to pass a public recruitment procedure (though some political groups have recently introduced tests) and are hired by the chairman of the group with a strong influence by national delegations. In practice, job stability has been almost as high as in the regular services. On the other hand, promotions were more easily awarded. Occasionally, permanent officials are 'seconded' for a given time to a group secretariat. A few senior officials used this procedure to accelerate their career and to take up top positions on return. This double-switch practice does not improve the non-partisan image of the EP services, and James Provan (see note 21) has rightly criticised it.
17. Recent studies include B.Wessels, 'European Parliament and Interest Groups', in R.Katz and B.Wessels(eds.), *The European Parliament, National Parliaments, and European Integration* (Oxford: Oxford University Press, 1999); on the question of regulation of lobbying in the EP, see T.Schaber, 'The Regulation of Lobbying at the European Parliament: The Quest for Transparency', in P.-H. Claeys *et al.*(eds.), *Lobbying, Pluralism and European Integration* (Brussels: European Interuniversity Press, 1998), pp. 208–21.
18. In 2001, out of the 85 proposals under co-decision which were discussed by the EP in first reading (see Table 1), no less than 73 were amended. Even in second reading, the EP amended the Council's common position in most cases: 34 out of 51. A similar ratio can be found in the consultation procedure: 113 proposals amended out of a total of 190.
19. The function of shadow-rapporteurs has become quite important during recent years. In some committees, they have regular meetings with the official rapporteur. In legislation where informal trilogue meetings with the Council and the Commission are common, especially in co-decision procedures, shadow-rapporteurs are sometimes invited together with the chairman and the rapporteur.
20. Modern parliamentary buildings generally include no space for a 'lobby'—every square metre must be used functionally. The new EP buildings in Strasbourg and Brussels are good examples. The vast space which used to be the lobby for all kinds of contacts has disappeared. Consequently, 'lobbying' has lost its semi-public character and has shifted into the privacy of individual members' offices or outside contacts.
21. Working Document No. 6 on Internal Reform: 'Legislative Assistance to Members—A Rethink (Revised version)'. Vice-President responsible: James Provan; 22 Nov. 2001.
22. Provan, 'Legislative Assistance to Members', p. 5.
23. See Provan, 'Legislative Assistance to Members', p. 4.
24. See Provan, 'Legislative Assistance to Members', p. 5: here he refers to a certain malaise among members about the extent to which committee secretariats handle political questions. But this unease does not extend to complaints of bias.

No Simple Dichotomies: Lobbyists and the European Parliament

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To call lobbyists of the European Parliament 'unelected legislators' is somewhat misleading. Similarly, to talk of 'inspired legislation', where laws, or more particularly amendments to legislation, are 'written by a lobby group from the civil society and more or less rubber stamped by a public body'[1] is to over-simplify a complex and mediated relationship between elected 'legislators' and unelected 'interest representatives'. Indeed, in the case of the European Union (EU), identifying a single 'public body' as a 'legislator' is problematic in itself as all three major institutions—Commission, Council and European Parliament—perform legislative roles. Moreover, securing a single, clearly defined imprint of a 'rubber stamp' on legislation is difficult given the inter-institutional bargaining that results in blurred and smudged legislative imprints at the best of times.

What should be made clear at the outset of any discussion of lobbying in the EP, therefore, is that the effects of lobbying are contingent and not certain. They fluctuate in accordance with inter-institutional interactions, national interests, types of policy, types of legislation, as well as the style of lobbying, the coalitions formed around specific policies and the nature of resources deployed by lobbyists themselves. If, as Beate Kohler-Koch notes, the EP has become 'a decisive target for lobbyists' since the enhancement of its powers under the co-decision procedure, lobbyists in turn have had to 'cope with the institutional structure, the procedures and the policy style within Parliament'.[2]

Alongside any empirical assessment of the effects of lobbying is a parallel normative dimension of the promotion of sectional interests. Historically, most Western parliaments have been able to accommodate the representation of 'functional' or 'sectional' interests pragmatically alongside territorial, individualistic, or party notions of representation.[3] Yet the challenges posed by group representation to established conceptions of parliamentary representation have raised fundamental normative questions about the impact of 'interest representation' upon established liberal democratic decision-making processes in the EU and its member states. These broader issues are raised elsewhere in this volume: what we are concerned with more specifically is the linkage between the 'unelected' representatives of organised interests and 'elected legislators' in the EP

In order to highlight these normative and empirical issues the following discussion is structured in two sections. First, some broad observations about the interactions between lobbyists and MEPs are made; and, second, a detailed example, of the processing of the Tobacco' directive in 2000–2001, is provided to substantiate some of these general claims.

THE 'WHO', THE 'WHAT' AND THE 'HOW' OF LOBBYING THE EP

Exactly what constitutes 'interest representation' is the cause of heated academic debate but need not detain us here. All that needs to be noted is that the range of interests represented in Brussels is vast. It has been estimated that there are some 10,000 lobbyists in Brussels.[4] In terms of the number of active groups and organised interests, Simon Hix calculated that in the mid-1990s there were in excess of 1,600, with three main types: 561 individual companies with their own public affairs units, 314 'Euro groups', and 302 public affairs consultancies and law firms.[5] By 1998, however, Greenwood identified 700 'Euro groups', 200 firms with their own public affairs units, and 25 public affairs consultancies operating in the Belgian capital.[6] In addition, there were some 135 territorial authorities active in Brussels.[7] Both estimates are exclusively 'Brussels-focused' and do not take into account the wide range of national groups throughout the EU which also seek to influence EU policies in indirect ways. The most effective collectively organised interests and lobbyists know that 'Brussels is very much an insider's town'.[8] They are aware that knowing who to speak to, and when, are vital resources in the informal interpersonal and inter-institutional networks operating in the Belgian capital.

Certainly there are frequent interactions between MEPs and organised interests. Indeed, the indispensability of interest representation is pointed out by Kohler-Koch, who notes that because of MEPs' information deficiencies and time constraints 'they have to be open to lobbying'.[9] The sheer scale of interaction was revealed in one survey of MEPs in 1996 which discovered that some 67,000 contacts occurred between MEPs and interest groups each year.[10] A more recent survey of MEPs, in 2000, recorded that over half of MEPs had weekly contact with interest groups; and around a third had weekly interactions with lobbyists.[11]

The Three Ts: Transmission, Translation and Timing

'Interest representation' and 'lobbying' in parliaments are normally justified in terms of information transmission, translation and timing. The transmission of information from interest organisations to MEPs is deemed essential as it provides pre-digested information for elected representatives who are often not experts in the particular policy area under consideration. This 'briefing' function also allows specific groups and organisations to translate often complex and technical information into accessible data for busy elected representatives. Indeed, as one Italian MEP noted, successful lobbyists supply 'information in…a clear fashion so that the [MEP] doesn't have to be an expert in the field'.[12] In these interchanges the preferences of MEPs and lobbyists alike are for issue-

specific briefings and the provision of detailed amendments at appropriate times. Of most use for both sides in the MEP-interest relationship is contact on 'issues of particular interest' and 'propositions for amendments to the directives under discussion'.[13] The clear preference in the EP is for direct, personal, welltimed and pertinent contact; with lobbyists providing targeted information on specific legislative amendments.

As important as transmission and translation of information, however, is the timing of its dissemination. The timing of the provision of information at the appropriate point in the EU's legislative cycle is a key resource of groups and lobbyists. Thus, Beate Kohler-Koch is in no doubt that: '[t]iming is considered to be most essential for successful performance' and that, in turn, the 'timing of interest representation is dominated by the procedural rules of EU-decision making'.[14] Certainly, with the extension of the co-decision procedure lobbyists have become increasingly aware of the need to 'act more quickly to get their views across to MEPs'. As Elaine Cruickshanks, Chief Executive Officer of the consultancy Hill and Knowlton International, notes 'players from the Council of Ministers and the Parliament are brokering deals much earlier under the codecision procedure'.[15]

Within the EP itself there is recognition of the intimate connection between substantive policy concerns and the procedural constraints and opportunities affecting the timing of influence. In this context, timing is particularly acute when amendments to Commission proposals are to be tabled in committee. Committees that have heavy legislative loads are especially colonised by representatives of organised groups and consultants. The sessions of the EP's Environment or Industry Committees, for example, regularly attract several hundred interest representatives. But the provision of information is not simply 'supply-led' but is also 'demand-led'. Committee rapporteurs, committee chairmen, vice-chairmen and shadow rapporteurs are particularly prominent 'targets' for the supply of information and, in reverse, are significant 'consumers' of information from outside organisations. Rapporteurs in drafting their reports routinely seek information not only from other EU institutions but also from interest associations and lobbyists.[16] In addition, committee members often request draft amendments from interested organisations when the groups concerned have not already suggested their own favoured amendments. As a consequence, the process of amendment in committee is often characterised by intensive negotiation, dialogue and compromise not only among committee members but, crucially, between MEPs and affected interests across Europe.

Amendment Overload

While the provision of detailed legislative amendments by lobbyists may be welcomed by busy MEPs in reducing their need to review complicated texts and draft amendments personally, one consequence of a preference for specific amendments is 'amendment overload'. It is not unknown for a single legislative proposal to attract up to 500 amendments in committee.[17] Indeed, the rise in the number of amendments tabled in Parliament, and the increased time-costs associated with voting, has resulted in electronic voting becoming more widely used in EP committees. Such time pressures, in turn, led to Parliament's 2002 Rules of Procedure further limiting the possibilities to table amendments in plenary.[18]

Of course, the tabling of amendments does not necessarily ensure their adoption when voted on. Nonetheless, the fact remains that interest representatives are currently responsible for the initial drafting of a very high proportion of the amendments tabled in Parliament's committees. Informed estimates put this in the region of 75 to 80 per cent in the most active legislative committees. More generally, few insiders would contest the fact that, even in the absence of specifically drafted amendments, the inspiration behind individual legislative (and other) amendments often flows from outside the EP

The sheer complexity of processing amendments should not be underestimated, with each amendment having to be translated into 11 languages, distributed to all committee members, and then voted on, or a compromise brokered. This process is complicated still further in instances (frequent in practice) of overlap between individual amendments, and of multiple amendments to individual articles and paragraphs of proposals and to draft reports. Moreover, duplication of tabled amendments is a common phenomenon, with different MEPs, even from different party groups, submitting identical amendments.[19] Besides the embarrassment factor in such cases, it is thus apparent which MEP has been successfully influenced by which interest. As one Commission official responsible for steering a legislative proposal through the EP remarked to one of the authors in June 2002: 'the latest sport in the Commission is to identify which group or company drafted which amendment'.

This does, of course, raise the intriguing normative question of whether such amending capacity is necessarily 'sinister' or 'anti-democratic'. The answer to this question lies beyond the scope of this particular article. Nonetheless, MEPs can, and do, defend their tabling of amendments, generated outside Parliament, as attesting to their responsiveness to societal demands rather than as evidence of their domination by unelected interests. They would also contend that each amendment has not simply to be tabled, but also presented, justified, argued, frequently compromised, and only then voted on in Parliament's committees or plenary. Amendments are often subject to intense controversy, with votes on individual amendments in committee frequently being more contested than the final vote in committee or plenary.

Inter-institutional and Intra-institutional Intelligence

MEPs and interest representatives trade not only substantive information on policies but also exchange 'inter-institutional' information. The reciprocal trading of information on the thinking and scheduling of legislation within the Commission or Council is a vital commodity in the MEP-lobbyist relationship. Of particular currency in this exchange is intra-institutional information on the work patterns of, and rate of legislative progress in, the various parliamentary committees engaged in processing specific directives. Representatives of interest associations and lobbyists often provide informal monitoring for MEPs of the asymmetries of committee activity on a particular directive. They track the different deadlines imposed by the various committees for the tabling of amendments; variations in the speed of processing proposals across committees; and possible divergences of policy emphases in the different committees dealing with the same issue. In this way, interest groups with a mastery of the EP's procedural complexities and a developed surveillance capacity provide not only substantive policy briefing but also inter-and intra-institutional intelligence for MEPs.

Hearings

The capacity of the EP to gain (and disseminate) information has been enhanced through the procedure of public hearings. Such hearings are convened by the EP's committees with the permission of the Bureau.[20] The purpose of hearings is to invite experts and interested organisations to provide evidence and engage in structured dialogue with committee members. Representatives of the Commission and Council attend the hearings, and the Commission is frequently invited to respond to the views expressed during the course of the hearing. In 2000, 17 hearings were convened, and 25 hearings were held in 2001. Indeed, in the first four months of 2002, 15 hearings were held and ranged across topics such as tobacco advertising and sponsorship, the future of European tourism, and sport and audiovisual rights.

The main advantages of public hearings are that they help committee members to familiarise themselves with a particular policy (either in terms of detail or the broader context). One dimension is that they provide a procedure whereby MEPs can engage in 'exploratory dialogue' and 'forward thinking' and so raise issues for consideration by the other EU institutions. Another dimension of hearings is that they provide MEPs with supplementary sources of advice and information from independent experts, organised interests and non-governmental organisations (NGOs) with which to assess the outcomes of the Commission's own pre-legislative consultations. Thus, for example, the hearing on tobacco advertising and sponsorship in April 2002 included speakers from public health interest groups (the Standing Committee of European Doctors, the European Cancer Leagues and the European Heart Network), from the tobacco industry (Imperial Tobacco, the Italian Association of Tobacco Producers and GITES), as well as from academic experts and the recipients of tobacco sponsorship.

Intergroups

'Intergroups' are unofficial groupings of MEPs who share a common interest in a particular cause or interest. With the exception of the intergroup of Elected Local and Regional Representatives no other intergroup has formal status within the EP Despite the 'unofficial' nature of these groups some 100 were in existence in 2000.[21] There is such diversity among intergroups in terms of size, membership, frequency of meetings, links with political groups and outside interests that it is difficult to make generalised statements about their activities.

Nonetheless, Corbett *et al.* list the benefits of intergroups for the EP as enabling MEPs to focus on a 'particular set of issues of specific national, constituency or personal concern', to specialise, to make contacts with outside interest groups on an informal basis, and to facilitate political contacts outside their own political groups.[22] There are, however, also certain disadvantages associated with intergroup activity. Indeed, concern with the operations of a few intergroups and their close connections with outside lobbies led the Conference of Presidents in 1995 to ratify an agreement to reaffirm and underline the unofficial status of such groups. Intergroups were expected to make clear that they were not organs of the EP, they did not speak on behalf of Parliament, and they could not use the EP's logo or its official title in any communications or printed materials. Specific rules were also drafted in the same year to bring intergroups into line with the rules concerning lobbyists and the declaration of financial interest of MEPs and their

assistants. In 1999 further restrictions were placed on the creation of intergroups when they were required to have the support of party group leaders before they could be constituted.

In addition to the concerns that some groups merely served as a 'front' for certain organised interests, there was also concern that the sheer scale and activism of intergroup networks constituted 'a rival centre of attention to official parliamentary activities, and in certain circumstances may undercut the latter'.[23] Thus, on occasion, the clash of timing of intergroup meetings with official parliamentary committee meetings and plenary debates has adversely affected attendance at the latter. Similarly, outside speakers occasionally quibble at attending committee meetings after appearing at intergroup sessions.

The 'Institutional Lobbyists'

In addition to 'mainstream' lobbying by interest representatives, the 1990s also witnessed a dramatic increase in the lobbying of the EP by the Commission and national governments (including third country governments). In recognition of the EP's enhanced legislative capabilities in that decade, the Commission and national governments acknowledged the necessity of maintaining a dialogue with appropriate MEPs.

The characterisation of national and Commission officials as 'lobbyists' in the context of EU decision-making is certainly not new. In 1993, for example, David Spence identified the national official as 'clearly a lobbyist of European institutions and other Member States' officials'.[24] Within the EP, Ken Collins, then chair of the Environment Committee, in his address to the hearing organised by the Rules Committee into lobbying in 1992, noted the difficulties in defining lobbyists. He argued that, as far as the EP was concerned, a definition should include not only 'delegations of the Council' but also 'Commission officials defending their proposals vis-à-vis Members and parliamentary committees...representatives of local and regional authorities and representatives of third countries'.[25] Thus, while the depiction of national officials as lobbyists is not new, the greater attention paid by them to the EP is relatively new. Whereas over a decade ago Spence devoted just one short paragraph to the role of the UK permanent representation in Brussels in following EP affairs, such a cursory treatment would be unlikely in the 2000s.

EU governments willingly provide policy briefings to their own national delegations in the EP. One EP committee chairman, in interview in the 1994–99 Parliament, observed that: 'My permanent representation—the Dutch—is giving us a lot of good briefing, written briefings, so I have good information about what's on the agenda; about what is the opinion of my own country'.[26] Traditionally, and as confirmed by this MEP, much national briefing was essentially formal, taking the form of written memoranda outlining the view of national administrations on Commission proposals, or on parliamentary reports once tabled for the EP's plenary.[27] What has changed in recent years, however, is that national officials and politicians have started to seek to influence EP proceedings more intensively, at an earlier stage, and in tandem with their evolving position in the Council of Ministers. There is also a recognition that national governments should provide tailored briefings for committee rapporteurs, other key committee actors, constituency MEPs, committee members and, ultimately, all MEPs in the run-up to

plenary, together even with a voting list ‘so that those who agree with your position overall know how to vote for it in detail’.[28]

Moreover, it is not unusual for individual permanent representation officials to suggest legislative amendments to their respective national MEPs in committee. Invariably these amendments parallel current national negotiating positions in the relevant working group of the Council. In this sense, national officials have started to intertwine themselves firmly into the pattern of interest representation within the EP. In addition, officials of the permanent representations sometimes also operate *collectively* in seeking to influence the EP, particularly as a result of co-decision. To this end, permanent representation attaches, who are responsible for relations with the EP, meet before each plenary session to co-ordinate their positions and identify targets for direct lobbying. Obviously, at this stage, national officials will reflect primarily the position arrived at in Council. Such lobbying may be intensive. In the run-up to the EP’s vote on the Members’ Statute in May 1999 (a vote which ultimately went against the view of Council), one of the permanent representation parliamentary attaches commented to one of the authors that he had ‘done nothing for a month but lobby the Parliament on the members’ statute’.

One recent, and dramatic, example of the significance of ‘institutional lobbying’ of the EP was provided by the ‘Takeover Bids’ directive. This directive (formally titled: 13th directive on Company Law, Concerning Takeover Bids) was rejected by the EP’s plenary after agreement in the conciliation committee. It was the first rejection of a joint text under the co-decision2 procedure. It was also the first rejection after a tied plenary vote of 273 in favour 273 against and 22 abstentions. Indeed, the high level of participation in the vote—with 568 MEPs voting—was itself unique. However, neither the details of the proposal, nor indeed of its passage through the EP,[29] are the focus of attention here. Instead, what is of importance is that the directive constituted the first co-decision procedure during which a member state dissented openly and assertively and decisively from a previously agreed Council common position—*and sought explicitly a parliamentary rejection*.

After reaching agreement in Council in June 2000, the German government subsequently withdrew its support in early 2001. The change of position came after intense lobbying of Chancellor Schröder by senior executives of German companies, especially VW and BASF, along with the head of the Mining, Chemical and Energy Workers’ Union.[30] Once the German government had dissociated itself from the common position then the process of conciliation became extremely complicated. At third reading, after intense lobbying of German MEPs—by the German government, leading German companies and trade unions—they voted overwhelmingly as a single national bloc irrespective of EP party group. As the *Financial Times* noted: ‘In a rare display of unity, the German government and opposition, along with leading business associations and trade unions all welcomed the vote.’[31] Conversely, Frits Bolkestein, the Commissioner with responsibility for the ‘Takeover’ directive, had no doubts that the blame for failure rested ‘squarely on Germany’.[32]

In this case, a national government, in conjunction with national interest organisations and national MEPs, was instrumental in securing the rejection of EU legislation. What is particularly significant for the present discussion is how the simple dichotomisation of roles between ‘elected’ and ‘unelected’ legislators becomes more convoluted in the case of the ‘Takeover’ directive. Indeed, the actions of ‘directly elected EU-level and EU-wide

legislators' (MEPs) can be counterposed by the actions of 'directly elected national representatives' (the German Council delegation) who, in turn, constitute 'indirectly elected EU legislators'. More significantly, and more contentiously, such national 'institutional lobbyists' may be designated as 'unelected EU-level and EU-wide legislators' in the immediate and literal sense that they do not have an EU-wide electoral mandate. But this is to get ahead of the argument. Let us first of all examine the respective contributions of 'elected' and 'unelected' legislators to the processing of the 'Tobacco' directive.

AN ILLUSTRATIVE EXAMPLE

Much has been written on lobbying within the EP, but there remains relatively little detailed research on the phenomenon.[33] One fairly common assumption is that the 'EP attracts a disproportionate amount of lobbying from certain groups (environmentalists, women, consumers, animal rights)'.[34] Yet offsetting this assumption is a growing recognition of the extensive involvement of business and corporate interests in the legislative activities of the EP.[35] Perhaps it is safest to conclude, therefore, that 'few interests dare risk leaving the parliamentary arena to their opponents, and hence [the EP]… attracts the full melange of stakeholders'.[36] To illustrate this point, the following study of the passage of the Tobacco labelling directive in 2000–2001 reveals both the intensity of lobbying and the differential and mediated effect of lobbying. Determining exactly which interests were winners and which were losers presupposes that bargaining in the EP is a zero-sum game. In practice, however, it may be a positive-sum game.

The 'Tobacco' Directive

The 'Tobacco' directive (formally entitled the Directive on the Approximation of Laws, Regulations and Administrative Provisions of Member States concerning the Manufacture, Presentation and Sale of Tobacco Products)[37] was submitted by the Commission to Parliament in January 2000. The lobbying of the tobacco industry and health activists was an important part of the processing of the proposal, as was informal interinstitutional contact, and the 'anticipatory' behaviour of MEPs.[38]

The complexity, as well as the political significance, of the issue was revealed in the nuanced process of lobbying by different organised interests and associations. Indeed, it is worth making a few broad observations about the development of the 'health lobby' before examining the details of the tobacco labelling case study. At one end of the lobbying spectrum are the 'health activist' groups. These include organisations such as the European Public Health Alliance, the Association of European Cancer Leagues and Medecins sans Frontiers. Most recently, patient organisations have started to have an impact in Brussels (such as European Patients Voice) as well as bodies representing patients with specific diseases (such as Alzheimer Europe, or Gamian, a group focused on mental illness). Certainly there has been a dramatic growth of such health activist groups over the last decade.

Ranged alongside 'health activist' groups are the representatives of specific healthcare sectors: such as healthcare insurance bodies—the Association Internationale des

Mutualité (AIM); pharmacists (the Pharmaceutical Group of the European Union; pharmaceutical wholesalers, the Groupement International de la Répartition Pharmaceutique Européenne (GIRP); doctors (the Standing Committee of European Doctors, and national organisations such as the BMA, which has had a permanent Brussels representation since the late 1990s); and healthcare managers (the European Health Management Association). Again, the healthcare sector has a much more visible and active representative presence in the EP than a decade ago.

At the other end of the spectrum are industry representatives. A particular feature of the lobbying process on the tobacco directive was the entry of the pharmaceutical industry into the debate, and its adoption of a moderately progressive stance in support of the case of health activists. (In part, this was not simply altruism, as some benefit would also accrue from the promotion of their own smoking prevention products.) Numerically, the EU 'health' lobby remains dominated by the pharmaceutical industry. Certainly, the industry has taken care to interpose itself into parliamentary networks. Thus, for example, the pharmaceutical industry's trade association, the European Federation of Pharmaceutical Industries and Associations (EFPIA) has employed a dedicated parliamentary affairs manager since the early 1990s. Moreover, since the mid-1990s, individual pharmaceutical companies represented in Brussels (as most are) stand out among the corporate sector in recruiting EP specialists to staff their Brussels government affairs representative offices. Today, the industry's representatives and its consultants form their own veritable mini-colony at the rear of Parliament's Environment Committee during discussions of pharmaceutical licensing and other legislative proposals relating to the sector.

Counterposed against these 'health lobbyists' were the representatives of the tobacco companies. But it should be acknowledged from the outset that there was no single, cohesive and overriding industry perspective on the tobacco directive. In fact, some of the very largest tobacco companies (such as Philip Morris) adopted a more positive position to the directive than did the smaller companies. At one level, the largest companies identified certain features of the EU's tobacco legislation—relating to packaging, labelling and advertising—as a potential means by which to maintain their current market shares indefinitely. Moreover, Swedish manufacturers of Snus (Scandinavian oral tobacco) sought to use the proposal to lobby against the impending ban on their product. In Sweden, the banning of Snus featured regularly as part of the ongoing discussions about the country's membership of the EU.

Given the sheer range of organisations with an 'interest' in the tobacco labelling directive, it is perhaps not surprising that the EP's rapporteur sought to structure lobbying through the convening of collective meetings of the different groups involved. This highlighted not only the range of interests, noted in the preceding paragraphs, but also the differences within and between different groups involved in the tobacco issue. The differences in the lobbying styles and organisational structures adopted by these groups was greater than their similarities.

The EP's Processing of the Proposal

The prime objective of the Commission's proposed directive was to combine and revise three existing directives on the tar content of cigarettes, oral tobacco and labelling of tobacco products. Indeed, the fingerprints of the Association of European Cancer Leagues are clearly discernible on the Commission's draft proposal. The main provisions of the directive included a reduction in the tar content of cigarettes; harmonisation of ceilings for levels of nicotine and carbon monoxide; more stringent requirements concerning the size and type of health warnings on tobacco packets; an obligation on manufacturers and importers to list additives, to explain the reason for such ingredients and to provide toxicological data on additives; a ban on misleading descriptors such as 'light' and 'low tar'; and new review and reporting procedures on the implementation of the directive. Despite the apparently technical nature of these issues, it is important to place the proposal in the political context of increasing concern in Europe over smoking and health.

The Commission's proposal was referred to the Committee on the Environment, Public Health and Consumer Policy as the committee responsible, and opinions were sought from the Legal Affairs, Industry and Agriculture Committees. Jules Maaten was appointed rapporteur on 26 January 2000 and the EP adopted his report in its first reading vote on 14 June 2000. Some 44 amendments were adopted at first reading.

In essence, Maaten and the Environment Committee maintained the EP's long-standing support for the Commission's preference for the strict regulation of tobacco products in Europe. Although most of the first reading amendments might readily be classified as 'technical' in nature, in fact many went to the heart of how tobacco products should be regulated in Europe, how tobacco is perceived, and followed an approach considerably at odds with that favoured by most of the tobacco industry. Significantly, in this case there was also an important political motivation underlying the Environment Committee's pursuit of what might be perceived by 'outsiders' as a search for technical perfection rather than political impact. This was simply that the tobacco industry had become an enthusiastic litigant against EU tobacco legislation. (Indeed, the directive resulting from Maaten's report was subject ultimately to three legal challenges.) MEPs were conscious, therefore, that amendments designed to maximise the health objectives of tobacco legislation would precipitate a legal challenge from the tobacco companies on the grounds that the limits imposed by the internal market legal base (Article 95) had been exceeded. This 'anticipation of future action against legislation' was evident in the arguments advanced by the rapporteur and other Environment Committee members. The 'anticipatory' logic was also apparent in Parliament more widely, as well as within the Commission and Council. Institutionally, if health objectives were explicitly advanced, decision-making in Council would have to have been by unanimity rather than QMV—to the detriment of the stringency of the measure likely to result. In turn, unanimity in Council would have led to dilution of the proposal by the most reluctant member states (Germany and Greece). As it was, Germany not only voted against the common position in Council but also launched a case in the Court of Justice against Council and Parliament's adoption of the measure.

The Commission accepted the majority of the EP's first reading amendments 'in whole or in part', in some cases subject to drafting modifications, and included them in its amended proposal. This was hardly surprising as the rapporteur had informally discussed his proposed amendments at length with relevant Commission officials. Indeed, from the start of the EP's processing of the proposal, the rapporteur also maintained close contacts with successive Council Presidency officials responsible for the dossier in the Council's working group. In fact, the Parliament's rapporteur undoubtedly acquired both a detailed knowledge and a strategic vision at least equal to that of member state officials in the Council's working group. If anything, the EP's rapporteur was placed in a possibly advantageous position in relation to his Council interlocutors, because, unlike the Council Presidency which changed every six months, the rapporteur was able to develop a longer-term perspective on the issue. (Indeed, there were four Council Presidencies during the processing of this proposal, and the rapporteur had to liaise successively with each.)

Of the amendments taken up by the Commission, only 15 were accepted wholly or in part by the Council. However, two of the EP's amendments that had not been accepted by the Commission were adopted. These related to the use of terms such as 'low tar', 'light' or 'mild' as product descriptions suggesting that a tobacco product was less harmful than others. In its consideration of the common position, the Environment Committee proposed the re-adoption of many of its first reading amendments. Included among the reintroduced amendments was one to require the reporting of test results after a deliberate change to a tobacco blend, rather than through an annual reporting system. On the issue of warnings, the EP favoured labelling which conveyed a 'serious message rather than simplistic slogans'[39] but was willing to compromise to take account of the reduced size of warnings. Parliament's desire to have larger warnings arose from an acceptance of research findings that the most direct medium for the communication of the dangers of smoking was the cigarette packet itself.[40] Moreover, the EP inserted a new paragraph enabling member states to require colour photographs or other illustrations of the health consequences of smoking to be displayed as part of the warning. This was modelled on the Canadian style of regulation. On this point the Environment Committee succeeded in stretching—or at least interpreting creatively—Parliament's own Rules of Procedure sufficiently to introduce amendments to the common position that had not been adopted at first reading. This was attributable, at least indirectly, to lobbying conducted by representatives of Health Canada who, in meetings with MEPs in Brussels, pointed specifically to the effect of earlier Canadian legislation which, notably, required the labels of cigarette packets to carry strong graphic images intended to deter smoking.

To maximise the effects of these general and additional warnings, the first reading amendment was reintroduced to require such warnings to be displayed on tobacco vending machines as well. Parliament also reintroduced its amendment on the harmonisation of testing. Similarly, the amendment requiring the Commission to submit a proposal (by December 2004) for a directive providing for a common list of authorised ingredients (and their addictiveness) for tobacco products was reintroduced.

Throughout the process proponents of strict regulation worked closely with MEPs. As Warleigh observes, relations between lobbyists and policymakers *'can be so strong that NGOs are seen by some institutional actors not as lobbyists but as colleagues* able to supply information otherwise unavailable through their participation in formal consultation with actors from other institutions'.[41] This was certainly the case for the

proponents of the strict regulation of tobacco products as they fed MEPs information relating to practices in third countries in support of their arguments, and, more specifically, drafted amendments and provided substantiating arguments for supportive MEPs.

In considering the EP's amendments, the Commission took into account the Court of Justice's ruling, of 5 October 2000,[42] annulling the directive on tobacco advertising.[43] The annulment of the tobacco advertising directive, effectively on the grounds that it exceeded the possibilities available under Article 95 for the EU to act against tobacco advertising, was a constant backdrop during the adoption of the tobacco labelling proposal, and became particularly important during the proposal's second reading.

At second reading a total of 32 amendments were adopted by Parliament. Of these the Commission accepted 22 and modified its proposal accordingly. Council announced that it was unable to approve all the amendments and, accordingly, conciliation followed. After six and a half hours of intense negotiations an agreement was reached at the concluding meeting held on 27 February 2001. Agreement was facilitated by the intensive inter-institutional interactions that had occurred at earlier stages of the process,[44] and by the prior meetings of the EP's delegation and the trialogue held with the Swedish presidency and the Commission on 6 February 2001.[45] Indeed, in the trialogue the Council accepted 12 amendments and presented compromise texts for some others.

The main issues for consideration in conciliation, therefore, included the nature of health warnings, prohibition of misleading descriptors, the use of photographs and illustrations, the list of ingredients, and a transitional period for exported tobacco products. Compromises were reached on all of these issues. At this stage, the proponents of tight controls on tobacco made available to the Conciliation Committee (and to all 626 MEPs) Canadian cigarette packets (which were empty!) to demonstrate that strict regulation of the labelling of tobacco products was entirely practical and, indeed, was already in force elsewhere. This provided a clear example of issue-specific coalition formation, where the key to influence was marginal advantage and certainly not shared values among groups.[46] Thus, for example, the financial cost of shipping and distributing the cigarette packs to all MEPs was met by a major pharmaceutical company; yet the accompanying letters were drafted and signed by health activists (transparently declaring pharmaceutical company support). Certainly on many other issues such activists have shown their hostility to the promotion of the interests of pharmaceutical companies.

The outcome of the conciliation process was judged by the EP's rapporteur to be that 'the agreement reached is an excellent one which goes well beyond what was possible before its second reading'.[47] On health warnings the message was strengthened and the size of health warnings was agreed on the basis of a Commission compromise. The possibility of member states authorising the use of photographs and other graphic material on cigarette packets was conceded and the Commission (much against its own will) was given the task of adopting appropriate rules by December 2002. Agreement was also reached that the descriptors 'mild', 'light' or 'low tar' were to be prohibited. (One result of this provision was that Japanese Tobacco, manufacturers of 'Mild Seven' cigarettes—whose brand and trademark were effectively outlawed in Europe—launched a Court of Justice case against the EP and Council.)

Tobacco companies were to be obliged to submit to authorities in the member states an annual list of the ingredients found in their products, and the Commission was to

initiate a proposal, by the end of 2004, for a list of all ingredients authorised for tobacco products. Compromise was reached on the issue of a transitional period (until 2007) for exported tobacco products to meet the tar and nicotine ceilings as products marketed in the EU. The tobacco industry (especially from the UK) had mounted a highprofile, and in the end quite effective, lobby on the transitional period. Lobbying focused overwhelmingly on the potential threat to employment as a result of the adoption of this provision. In particular, a targeted campaign, ostensibly led by workers and their trade unions in the tobacco industry, was directed at MEPs with cigarette factories in their constituencies. Coalition formation, in this case between employers and employees, and their trade unions, was again based on short-lived common interests, and was again successful. In addition, the position of MEPs was moderated by a recognition that legislation banning the export of high-tar cigarettes from the EU might contravene World Trade Organisation rules.

CONCLUSION: NO SIMPLE DICHOTOMIES

The reciprocal transmission of information from organised interests to MEPs, and the subsequent enhancement of the informational resources within the EP, has many benefits. Nonetheless, there remains a deep-seated concern that ‘reconciling the demands of self-interested private interests with the wider interests of civil society [is] a central problem of democratic life’.[48] Historically, interest representation has been regarded as a particular ‘problem’ for parliaments. Elected assemblies have institutionalised the norms of the equal status and voting weight of individual representatives, and the transparency of deliberation. In practice, however, the interactions between organised interests and elected representatives often reflect inequalities of access to, and provision of, information; and translucent rather than transparent bargaining. In these circumstances, fears about the representation of ‘sinister interests’, to use John Stuart Mill’s phrase,[49] are articulated and demands for regulation emerge.

Just such fears and demands emerged after the introduction of direct EU elections to the EP in 1979 and have increased with each successive increment in the EP’s legislative powers. In an environment in which MEPs ‘retain close links with particular sectors or interest groups which will help to condition their choice of priorities’,[50] what concerns MEPs and outsiders alike is just how close these links are, and what kind of resources and incentives are used to ‘condition the choice of priorities’. These concerns over the unregulated activities of lobbyists led to a seven-year campaign for the regulation of lobbying and lobbyists in the face of accusations that the voting independence of a small number of MEPs had been impaired by their pecuniary involvement with outside interests.[51]

The culmination of this campaign, and of exceedingly protracted deliberations, was the amendment of the EP’s Rules of Procedure in 1996-and the insertion of a new annex in 1997 (Annex IX)—on lobbying in Parliament (Rule 9).[52] The main purpose of the 1996 rule changes was to make the activities of interest representatives more transparent by establishing a public register of lobbyists. Henceforth, lobbyists were required to respect a code of conduct and sign a register that was to be made available to the public on request. In return, lobbyists were to be granted a photo ID access pass to Parliament’s

buildings, obviating the need to be 'signed in' to the building or to be accompanied therein. Also in 1996 rules were adopted to monitor the 'interests' of MEPs themselves.[53]

Clearly, through these rules the EP and its members recognise the potential dangers of the 'unelected' representatives of sectional interests promoting those interests over and above an EU 'general interest' articulated by elected legislators. In practice, however, the simple dichotomy between 'elected' and 'unelected' legislators is blurred by the indirectly elected status of the Council and its national delegations and the 'unelected' status of the Commission itself. Yet, in the context of the EP's legislative process, these institutions constitute external 'institutional lobbyists'.

If the simple divide between 'elected' and 'unelected' legislators is more problematic than at first appears, so the notion of 'legislator', as expressed in the introduction of this volume, also proves to be contentious. It is one thing to argue that lobbyists and interest representatives contribute to the legislative process and that 'public legislation comes in many different forms and from many different sources'. It is another, however, to argue that the legislative impact of lobbyists is necessarily unmediated, direct or even unidirectional. This is not to deny that lobbyists can and do write specific legislative amendments, or that MEPs actively seek such amendments (or non-legislative interventions from lobbyists—such as questions). Instead, it is to note that precisely because legislative interventions derive from 'many different sources' the notion that elected representatives merely rubber stamp the interjections of lobbyists should be questioned. As the example of the tobacco directive illustrates, there are often competing and occasionally overlapping coalitions of 'unelected' interests aligned with different constellations of elected representatives. Moreover, there is no unambiguous normative correlation between 'elected-equals-good' and 'unelected-equalsbad'. In the case of the 'tobacco' directive, some business interests (a pharmaceutical company) co-operated with health groups (good?) while others (some workers' organisations) co-operated with Tobacco companies (bad?). In turn, some MEPs, in representing the interests of their electors and their sustained employment in the tobacco industry (good?), did so by supporting the case of tobacco companies (bad?). None of these statements should be taken as normatively categorical assessments. Instead, they simply point to the complexity of the processing of legislation within the EP and to the multi-dimensionality of EU decision-making. In these nested dimensions the normative certainties of 'good' and 'bad'—commonly associated with the adjectives 'elected' and 'unelected'—have to be re-examined, as, indeed, does the very concept of 'legislator' itself.

NOTES

1. R.van Schendelen and R.Scully, 'Introduction', this volume, p. 4.
2. B.Kohler-Koch 'Organised Interests and the European Parliament', *European Integration online Papers*, 1/9 (1997); eiop.or.at/eiop/texte/1997–009a.htm, p. 5.
3. See D.Judge, *Representation: Theory and Practice in Britain* (London: Routledge, 1999), pp. 97–120.
4. *European Voice*, 17–23 Feb.2000, p. 8.
5. S.Hix, *The Political System of the European Union* (London: Macmillan, 1999), p. 192.
6. J.Greenwood, 'Regulating Lobbying in the European Union', *Parliamentary Affairs*, Vol. 51 (1998), p. 587.

7. J.Greenwood, *Representing Interests in the European Union* (London: Macmillan, 1997), p. 9.
8. Greenwood, *Representing Interests in the European Union*, p. 5.
9. Kohler-Koch, 'Organised Interests and the European Parliament', p. 6.
10. B.Wessels, 'European Parliament and Interest Groups', in R.S.Katz and B.Wessels(eds.), *The European Parliament, the National Parliaments, and European Integration* (Oxford: Oxford University Press, 1999), p. 109.
11. R.Scully and D.M.Farrell, 'Understanding Constituency Representation in the European Parliament' (paper presented at the Conference of the European Community Studies Association, Madison, 31 May–2 June 2001), Table 4.
12. Quoted in Burson-Marsteller, *Guide to Effective Lobbying of the European Parliament* (Brussels: BKSH, 2001), p. 19.
13. Kohler-Koch, 'Organised Interests and the European Parliament', Figure 5.
14. Kohler-Koch, 'Organised Interests and the European Parliament', p. 9.
15. Quoted in *European Voice*, 17–23 Feb. 2000, p. 8.
16. See D.Judge and D.Earnshaw, *The European Parliament* (London: Palgrave, 2003).
17. For example, the proposed creation of a European Food Agency in 2001 (COD 2000/0286) garnered nearly 500 amendments in the Environment Committee; the review of EU pharmaceutical legislation (COD 2001/0252 and COD 2001/0253) during 2002 generated over 700 amendments to two legislative proposals.
18. Rule 110a requires Committee reports adopted with less than one-tenth of Committee members voting against to be placed on the plenary agenda for vote without amendment, unless political groups or individual members constituting at least one-tenth of MEPs request otherwise, in writing. Rule 139.1 requires amendments tabled in plenary to be tabled by the committee responsible, a political group or at least 32 members. European Parliament, *Rules of Procedure*, Amended Text, Provisional edition, July 2002 (Brussels: European Parliament, 2002).
19. For example, identical amendments were tabled in the Industry Committee by Liberal, Christian Democrat and Socialist MEPs in support of tobacco company interests, delaying a ban on the export of high-tar cigarettes (see the second section of this article).
20. European Parliament, *Rules of Procedure*, Rule 166, interpretation.
21. *European Voice*, 6–12 April 2000, p. 24; for an indicative list see R.Corbett, F.Jacobs and M.Shackleton, *The European Parliament* (London: John Harper, 4th edn., 2000), p. 165.
22. Corbett *et al.*, *The European Parliament*, p. 158.
23. Corbett *et al.*, *The European Parliament*, p. 158.
24. D.Spence, The Role of the National Civil Service in European Lobbying: The British Case', in S.Mazey and J.Richardson(eds.), *Lobbying in the European Community* (Oxford: Oxford University Press, 1993), p. 47.
25. PE 155.236, 'Notice to Members', Committee on the Environment, Public Health and Consumer Protection (Brussels: European Parliament, 1992), Annex i.
26. Quoted in D.Earnshaw and D.Judge, 'The Life and Times of the European Union's Co-operation Procedure', *Journal of Common Market Studies*, Vol. 35 (1997), p. 555.
27. See also J.Humphreys, *Negotiating in the European Union* (London: Random House, 1997).
28. Humphreys, *Negotiating in the European Union*, p. 200.
29. For such details, see Judge and Earnshaw, *The European Parliament*.
30. *Financial Times*, 6 July 2001.
31. *Financial Times*, 6 July 2001.
32. *Financial Times*, 5 July 2001.
33. Exceptions include A.Warleigh, 'The Hustle: Citizenship Practice, NGOs and "Policy Coalitions" in the European Union—The Cases of Auto Oil, Drinking Water and Unit Pricing', *Journal of European Public Policy*, Vol. 7 (2000), pp. 229–43; Kohler-Koch, 'Organised Interests and the European Parliament'.

34. S.Mazey and J.Richardson, 'Interest Groups and EU Policy-Making: Organisational Logic and Venue Shopping', in S.Mazey and J.Richardson(eds.), *European Union. Power and Policy-Making* (London: Routledge, 2nd edn., 2001), p. 229.
35. For example, see D.Earnshaw and J.Wood, The European Parliament and Biotechnology Patenting: Harbinger of the Future?', *Journal of Commercial Biotechnology*, Vol. 5 (1999), pp. 294–307; P.Bouwen, 'Corporate Lobbying in the European Union: The Logic of Access', *Journal of European Public Policy*, Vol. 9 (2002), pp. 365–90; C.Burns, 'More Power Not Less? The European Parliament and Codecision' (unpublished Ph.D. thesis, University of Sheffield, 2002)
36. Mazey and Richardson, 'Interest Groups and EU Policy-Making', p. 230.
37. COD 1999/0244, Directive on the Approximation of Laws, Regulations and Administrative Provisions of Member States concerning the Manufacture, Presentation and Sale of Tobacco Products (Brussels, 1999).
38. 'Anticipatory' in the sense of identifying what was possible in legal terms so as to ensure that legislation was not killed later by litigation on the part of the tobacco industry.
39. PE 293.679, Recommendation for Second Reading on the Council Common Position for Adopting a European Parliament and Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco Products, Committee on the Environment, Public Health and Consumer Policy (Brussels: European Parliament, 2000), p. 27.
40. PE 293.679, Recommendation for Second Reading on the Council Common Position, p. 27.
41. Warleigh, 'The Hustle', p. 235, emphasis in original.
42. C-376/98, Judgment of the European Court of Justice, Federal Republic of Germany v European Parliament and Council of the European Union. Directive 98/43/EC—Advertising and sponsorship of tobacco products—Legal basis—Article 100a of the EC Treaty (now, after amendment, Article 95 EC) (5 Oct.2000).
43. 98/43/EC, Directive: Advertising and Sponsorship of Tobacco Products.
44. See *European Voice*, 7 Dec. 2000.
45. PE 287.586, Report on the Joint Text Approved by the Conciliation Committee for a European Parliament and Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco Products, European Delegation to the Conciliation Committee (Brussels: European Parliament, 2001), p. 6.
46. Warleigh, 'The Hustle'.
47. PE 287.586, Report on the Joint Text Approved by the Conciliation Committee, p. 8.
48. J.Greenwood and C.S.Thomas, 'Regulating Lobbying in the Western World', *Parliamentary Affairs*, Vol. 51 (1998), p. 487.
49. J.S.Mill, *Considerations on Representative Government* (London: Dent, 1910[1861]), p. 254.
50. Corbett *et al.*, *The European Parliament*, p. 58.
51. See Greenwood, *Representing Interests in the European Union*, p. 81; M.Shephard, 'The European Parliament: Getting the House in Order', in P.Norton(ed.), *Parliaments and Pressure Groups in Western Europe* (London: Frank Cass, 1999), p. 156.
52. For details, see Greenwood, *Representing Interests in the European Union*, pp. 90–100; Shephard, 'The European Parliament: Getting the House in Order', pp. 162–4.
53. For details, see Judge and Earnshaw, *The European Parliament.*

Out of the Shadows: The General Secretariat of the Council of Ministers

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Influence does not equal formal powers. The European Union is rich in examples of institutions which, in the absence of formal powers, nevertheless manage to bring significant influence to bear on the policymaking process. Often they do so through a direct link to organised interests, the ability to generate public debate and the resultant impact on the policy agenda of the European Union. The Commission is, of course, the prime example of an institution that has significant influence over the EU's policy process through its ability to set the agenda, even though it lacks in most policy areas the formal powers ultimately to take decisions.

One might say that these examples demonstrate that, under certain conditions—for example in the absence of formal powers or when interests do not have direct, institutional or informal access to the decision-making bodies—influence may be a consequence of an institution's ability to 'make noise'—to bring certain issues to the attention of organised interests, the political press or the wider public generally, and to rely on any public pressure arising to influence the institutions formally taking decisions in the desired manner. It is a strategy with uncertain effectiveness, depending as it does on a number of degrees of separation. Will organised interests or the wider public actually react in the anticipated (and desired manner)? Will the issue be covered by the news media? Will 'public pressure' be sufficient to influence the legislative process, or can it be ignored by the decisionmaking institutions?

Such questions are amplified in the case of the European Union, where formal decision-making takes place in arenas which are often regarded as being distant from the citizen, and where any public pressure is refracted through the prism of (at least) 15 different national publics, communicative spaces and political cultures. However, despite (and sometimes because of) these peculiarities of the EU system, 'making noise' remains an option for influencing decision-making in the European Union, and one that is used frequently by different political actors, with varying degrees of success.

Against this background of the political potential of 'noise', the general secretariat of the Council of Ministers is an oddity: while it lacks formal decision-making powers, its officials have eschewed 'noise' and still developed an important role in different areas of EU policy-making. To the extent to which the Council secretariat influences EU

policymaking, it is a distinctly quiet influence. This makes the Council secretariat a very interesting case in this volume's analysis of 'unelected legislators': not only does the secretariat constitute a prime case of the 'unseen hand', but it is also a case of the 'hushed voice'. Rather than seeking the highprofile exposure of media campaigns, frequent speeches and the like, the Council secretariat has relied on working in the background and giving direct advice to ministers, ambassadors and other member state representatives.

This article seeks to shed some light on what is generally a not very well-illuminated corner of the EU's institutional architecture. After a general overview of the Council secretariat's role in the EU, it looks in greater detail at its involvement in the ordinary, first pillar policy process, the process of treaty reform and decision-making in the area of CFSP A concluding section then examines the current and future challenges facing the Council secretariat in the light of its recent development.

THE COUNCIL SECRETARIAT: FROM ADMINISTRATIVE OBSCURITY TO INSTITUTIONAL FAME

The Council's general secretariat may not be an institution in the formal sense of the EU treaties, but it is quickly becoming a key player in the institutionalisation of European governance. Its long-standing role has been that of providing the Council of Ministers with central administrative services.[1] It facilitates the meetings taking place within the ambit of the Council—in other words the meetings of the various sectoral councils—but also of key committees and the myriad of sub-committees and working groups which prepare the decision-making of Coreper and ministerial councils.[2]

There are thousands of such meetings in the EU's legislative cycle, and managing the mere logistical exercise of providing meetings rooms, printing and disseminating documents, maintaining meeting schedules and providing interpreting, minute-taking and other support services is no mean feat. At one level, the Council secretariat constitutes a 'dignified conference centre', as one participant has called it. However, it is clearly much more than that. While servicing Council meetings has always been a core task, it is neither the purely technical activity it may appear to be at first sight, nor is it the only responsibility of the secretariat.

In fact, the 'support' of the Council includes highly political matters. These include providing legal and political advice to the Council generally, and to the Presidency in particular; legal representation of the Council in cases before the European Court of Justice; assisting the Presidency in the taking of minutes in Council meetings, the setting of meeting agendas and the running of meetings; helping of Commission and Presidency in the search for compromise in Council decision-making; maintaining regular relations with the Commission and the European Parliament in joint management of the legislative process.

This involvement of the Council secretariat applies not just to the day-to-day policy process of the European Union, but also to the running of European Council meetings and the—increasingly frequent—revision of the treaties through inter-governmental conferences (IGC). Just as with secondary legislation, the Council, the European Council and the Presidency also rely on the legal, administrative and political expertise of the

Council secretariat when it comes to the making of primary EU law. The IGC's 'conference secretariat' is usually staffed by the Council secretariat and provides essentially the same services to the IGC as it does to the Council proper.

The potential, indirect influence of the Council secretariat in the legislative and treaty reform processes has always been a feature of its role in the EU's institutional structure. More recently, the acquisition of substantial executive responsibilities has fundamentally changed the nature of the secretariat. From being essentially a small bureau providing logistical support, legal opinion and political advice, developments in the areas of justice and home affairs, and in particular foreign and security policy, have turned the secretariat into a sizeable executive agency in its own right.

The past decade has witnessed an unprecedented growth of the Council secretariat as it acquired new tasks, responsibilities and resources. This included the takeover of three previously independent secretariats. As a result of the Maastricht Treaty the 'EPC secretariat', established in the 1980s to facilitate liaison between national foreign ministries as part of the European Community's European Political Co-operation—the fore-runner of the CFSP—was integrated into the Council secretariat. The so-called Schengen secretariat, dealing with the exchange of information in the area of asylum and immigration policies of the member states was incorporated after the ratification of the Amsterdam Treaty. Most recently, parts of the responsibilities of the secretariat of the Western European Union—the defence alliance of the European NATO members—were taken over by the Council secretariat. In addition, there has been the creation of a CFSP planning unit and of the EU military staff. Most significantly, the responsibilities of 'High Representative for the Common Foreign and

Security Policy' have been added to the post of secretary-general. The fact that, with the appointment of former Spanish foreign minister and secretarygeneral of NATO Javier Solana, the first holder of this position was not an administrative, but a senior political appointment demonstrates the stepchange that has taken place in the secretariat. The day-to-day running of the Council secretariat has therefore been left to the deputy secretary-general, a post currently held by the former French permanent representative, Pierre de Boissieu.[3] Both Solana and de Boissieu have demonstrated the potential independence of their positions by making public statements that have been highly critical of member states.[4]

As a result of these developments, there has been a substantial growth in the numbers of staff working in the Council secretariat, much greater diversity in terms of the sectoral policies covered and an increase in the share of seconded national officials as part of the overall workforce. This in turn, and in line with the iron laws of administration, has required greater attention to issues of internal governance. The arrival of staff from what were previously different organisations (in particular the Schengen secretariat, the EPC secretariat and, most recently, the WEU secretariat) did cause some ripples in an administration that had remained largely unchanged for decades.[5] Integration across the different types of staff—permanent and seconded; legal, diplomatic and military—is proving difficult.

This brief overview of the responsibilities of the Council secretariat indicates that it plays a limited, but central, role in the current phase of the EU's evolution. Beyond its traditional contribution to the search for compromise agreement in the legislative process it is also at the heart of the proceedings in treaty reform and at the forefront of the

evolution of the Union's foreign, security and military policies. The subsequent sections will briefly elaborate on these three key responsibilities of the Council secretariat. While looking across these different areas, it may be useful to keep in mind that 'influence', in the way it is understood here, relates to the capacity of Council secretariat staff to have an impact on EU decisionmaking. This concerns first and foremost the legislative process, but also includes a recognition of the relevance of 'soft law' in the European Union, and thus on the degree of influence the Council secretariat has had on that. This latter aspect of the secretariat's influence is particularly pertinent with respect to the second and third pillars, while the former clearly matters most in the context of the legislative process in the first pillar.

QUIET INFLUENCE: THE COUNCIL SECRETARIAT'S ROLE IN THE EU POLICY PROCESS

The Council secretariat's role of assisting the Presidency and providing legal and other assistance facilitates the influencing of Council decisions, albeit in a subtle way and within a narrow policy range. On the whole, the secretariat is limited to reacting to the policy proposals and the wider agenda emanating from the member states and the Commission. If and when it has tried to drive a certain agenda itself, success has been limited. However, once proposals or draft legislation enters 'the house', as it were, the secretariat does have opportunities for political influence.

Any such influence depends on numerous factors. An important one is the relationship between the secretariat and the Presidency of the day. Different models have been experienced in this respect, but the common practice (especially for the smaller member states) is to leave much of the organisation of Council business in Brussels, and therefore in the hands of the Council secretariat staff. With a Presidency usually concentrating on a small number of pet projects, the management of the vast majority of Council business remains the task of the secretariat. This provides opportunities, for example, to prioritise certain agenda items over others or to suggest changes to proposals in the light of legal opinion.

It is important to recognise that such influence occurs within the confines of what a Presidency as well as the member states generally permit. There is therefore no platform for radical changes, but rather for tinkering with the detailed and complex matter of policy proposals and draft directives. Then again, the devil is in the detail of much of what the European Union is engaged in, and even minor changes of wording in legislative texts can have significant political implications.[6] However, *if* a Presidency decides to 'take over' micromanagement of the EU's policy agenda then the influence of the secretariat is curtailed. But this is a strategy that insiders consider leads to less than optimal results.[7]

Given the way in which the nature of the Presidency determines to a large extent the Council secretariat's opportunities for influence in the policy process, it is necessary to expand a little on this. As many observers and practitioners have recognised, the six-monthly term of any Presidency is actually very short—too short to engage properly with the detailed policy agenda across the whole range of Union policies and provide consistent leadership in the decision-making process. The consequences of this state of

affairs are, first, periods at the beginning of each Presidency when the member state in question is still feeling its way in many of the areas of EU policy and, second, inconsistencies across the policy areas depending on each Presidency's priorities and preferences. In other words, it is not just the choices made by each individual Presidency, but also the structural feature of charging a rotating, short-term Presidency with important leadership tasks in the Council that governs the influence of the permanent secretariat. Another important qualification in discussing the Council secretariat's influence is the need to cultivate relationships with the EU's more openly 'political' actors, whether this is the European Commission, Coreper or individual member states. The Commission, in particular, is a candidate for close co-operation in the policy process. Council (and therefore Council secretariat) and Commission are often regarded as rivals, but in fact there are frequent occasions where their relationship is better characterised as a division of labour.[8]

When legislative proposals reach the Council working groups, the Commission often finds itself in a contradictory position. On the one hand, it seeks to advance its own proposal; on the other hand, it is expected to mediate between differing views among the member states. However, the Council secretariat, in 'advising' the Presidency on how to run a particular meeting, may be in a much better position to mediate different positions and to assist the search for a compromise. Thus, mediation and search for compromise can be greatly assisted by the co-operation and the exchange of information on the positions taken by national delegations between Commission and Council secretariat staff.

In this context one should also bear in mind the need for Commission and Council to co-operate with respect to the Union's comitology structures. In areas where member states delegate executive responsibility to the Commission, committees are the chosen method to supervise the Commission's execution of these delegated powers. In an area such as *trade*, where the Commission is negotiating multilateral agreements on behalf of the Union, the Council issues the negotiating mandate and monitors the Commission's conduct through a specially convened committee (Article 133 committee). Formally, it is again the Presidency that takes the lead in shadowing the Commission, but effectively it may often be the task of Council secretariat staff to monitor the Commission and brief the Council on the progress of negotiations.[9]

In sum, the Council secretariat does have a distinct, albeit limited, role in the EU legislative process. Its influence in first pillar matters is dependent on the space provided by the Presidency, the tactical alliances which can be struck in the context of a particular committee, Council or European Council meetings as well as on the nature of the legislative proposals on which deliberations in the Council are based.

THE COUNCIL SECRETARIAT AND EU TREATY REFORM: INSTITUTIONALISING CONSTITUTIONAL POLITICS

The making of secondary EU legislation takes place in a highly institutionalised context. Treaty revision, on the other hand, is traditionally seen as rather unstructured, an occasion for member states to confront one another with conflicting views about the future development of the integration process, and the eventual achievement of agreement on

treaty reform as a result of intense bargaining. While this view of treaty reform is not necessarily wrong, it provides only a partial perspective on this feature of European integration. Treaty reform has over the past two decades become a permanent feature of the integration process. It is not a rare occasion to revise the treaty, or even a series of events, but a quasi-constant process of constitutionalisation where each instance of treaty reform already provides the starting point for the next. It is also a process that has become increasingly institutionalised, with numerous rules being laid down as to the working methods of negotiating treaty reform. The latter is a development in which the Council secretariat has had no small part.[10]

Arguably the most important aspect of the Council secretariat's role in IGCs is the provision of legal advice to the conference generally, and to the Presidency in particular. The Council secretariat's legal service is designated as the legal service of the conference, thus gaining a privileged position, if not a monopoly, with regard to the interpretation of new or revised legal articles being discussed. This puts the legal staff of the Council secretariat in a crucial position: in the absence of recourse to judicial review of individual aspects of the negotiation results, the 'legal advice' of the Council's legal service on proposals for draft articles is authoritative and can therefore constitute a constraint on the possibilities for treaty reform.

The Council secretariat's acquisition of this role as the provider of legal advice to the IGC may seem like a 'natural' choice of governments, but matters are probably less innocent than that, given that such decisions concerning organisational detail are drafted by the Council secretariat itself. The Single European Act (SEA) IGC, convened under the influence of Delors' preferences for a negotiation format, was assisted by a legal service that included the legal advisers of both Commission and Council secretariat. By the time of the next IGC, the Council secretariat was made solely responsible for legal advice, and this has remained the practice ever since.

The capacity of the Council secretariat to intervene in the negotiations—if requested—through the provision of legal advice stands alongside the more general, and substantive, advice the Council secretariat staff can, and does, provide in the negotiations. Such an ability to provide advice, and the willingness of the Presidency and the other delegations to accept it, is derived from two aspects of the secretariat's involvement in IGCs. First, the Council secretariat acts as the institutional memory of the conference. As the official record-keeper of the conference, the secretariat has easy access to past discussions, documents and papers, and can use these, as appropriate, to influence ongoing negotiations.

A second, related, point concerns the personal experience of the secretariat staff involved in the IGC negotiations. In contrast to the situation in member states, where political change and administrative turnover in foreign offices tend to change the composition of national delegations, the staff in the Council secretariat unit responsible—the 'Directorate for General Political Questions'—has experienced greater continuity and therefore possesses greater personal knowledge of the past IGC record. Possessing both the institutional record of, and the personal insights into, these intricate and complex matters provides Council secretariat staff with a valuable resource in the negotiations.

However, statements about the potential influence of the Council secretariat have to be qualified on a number of counts. First, the opportunities arising for the secretariat staff to influence the negotiations lie predominantly in fine-tuning the detail of treaty revisions,

not in the decisions about the broad outlines of treaty reform. That is one reason why the involvement of the Council secretariat has hardly reached the public limelight. Nevertheless, such influence in legal detail may have significant political impact and deserves to be addressed systematically in research on treaty reform.

A second, more important qualification concerns the secretariat's relationship with the Presidency, which, as already noted in the previous section, is a flexible one. Much of what has been said above regarding the significance of the Council secretariat's role in drafting agendas and meetings, providing legal and other advice and fine-tuning the detail of negotiations crucially depends on the permissiveness of the Presidency to provide such opportunities for influence. That is why, ultimately, we can only speak of potential influence of the secretariat. Formally, the secretariat is charged with assisting the Presidency, and its influence is realised if and when a Presidency does indeed rely on the assistance that the secretariat can offer.

In the past, this is what Presidencies have usually done, though there are also noteworthy exceptions. Until the French Presidency in the second half of 2000, any period of IGC negotiations had been presided over by one of the smaller states, and these generally welcome the assistance which the Council secretariat can provide, given the pressure on a country's resources during the Presidency. On that basis, the detail of IGC negotiations has usually been managed in 'Brussels', that is, in close co-operation between the permanent representation of the member state holding the Presidency and the staff of the Council secretariat. This co-operation routinely stretches to the first draft of the minutes of meetings, the conclusions of ministerial and European Council meetings or even draft treaties being written in the Council secretariat. Given the significance that is usually attached to the role of the Presidency in steering the IGC, this 'behind the scenes' influence of the Council secretariat is remarkable.

With the adoption of a convention method to prepare the 2004 IGC, it might be asked what such additions to the treaty reform process hold in store for the Council secretariat. One might assume that a greater degree of openness would diminish the role of the secretariat, and therefore also its potential for influence. However, the experience of the Fundamental Rights Charter Convention seems to suggest otherwise. Here again, the Council secretariat, providing the Convention's secretariat and legal service, turned out to be an influential player in the proceedings. Indeed, one could argue that because of the higher number of participants, the greater choice of options and the absence of the Presidency as pivotal player, a future convention may require more, rather than less, input and 'assistance' from the Council secretariat.

With respect to the Convention preparing the 2004 IGC, the waters are further muddied by the fact that the Convention secretariat was staffed not only by the Council secretariat, but also by the European Commission and the European Parliament. The Laeken Presidency Conclusions state that the Convention 'Praesidium will be assisted by a Convention secretariat, to be provided by the General secretariat of the Council, which may incorporate Commission and European Parliament experts'. It will be interesting to observe the co-operation between the three institutions in the running of the convention. So far, the drafting in which the Secretariat has assisted, in particular the work on the Convention's budget and the draft constitutional treaty published in October 2002—and the media reaction to it—has demonstrated that it is more than merely a technical task.

The introduction of a convention is widely seen as a response to the inefficiencies of the IGC method. Already it is obvious that the convention method is rich in institutional innovations: for example, it was the first time national MPs and representatives of non-member states participated directly in the revision of the treaty. Building on the experience, and the precedent, of the Fundamental Rights Convention, it has promised a new departure in the institutionalisation of the treaty reform process. At the same time, its influence over the subsequent IGC proper will be resisted by member states. In this context, many of the institutional choices to be made by the Convention Praesidium may turn out to have a much wider, longer lasting and ultimately constitutional significance. The Council secretariat, in advising and assisting the Praesidium,[11] has been involved in the making of these choices, placing it at the heart of the EU's constitutional politics of the next few years.

OUT OF THE SHADOWS: THE COUNCIL SECRETARIAT AND EU FOREIGN AND SECURITY POLICY

With respect to the first pillar policy process and the treaty reform process, the Council secretariat's responsibilities and opportunities for influence are rather similar, despite the fundamentally different context within which its work takes place. With respect to the second pillar of EU policy-making, however, the Council secretariat is an entirely different animal. While it is true that in CFSP matters the staff of the Council secretariat is formally still 'advising' and 'assisting' the Presidency, and that much of the work here also concerns the running of committees (in particular the Political Committee and its sub-committees), in practice the Council secretariat has developed into a quasi-executive agency making policy in its own right.

The acquisition of these powers has been gradual, but the speed of the changes accelerated in the course of the 1990s. Member states, concerned to achieve greater coherence in their efforts to co-operate in foreign policy matters, sought to improve the institutional underpinnings of foreign policymaking. At the same time, they were loath to give the Commission additional powers in this field, an option theoretically open to them, and one that is still being advocated by the Commission itself.

Member states tried to square the circle by building up foreign policy structures in the Council secretariat rather than relying on those (such as the External Relations DG) already present in the Commission. The European Political Co-operation (EPC) secretariat, created in 1986 outside the Community structure, was incorporated into the Council secretariat after the Maastricht Treaty. This followed the acknowledgement that foreign policy was a responsibility of the Union, and that Union institutions needed to be involved in it. The treaty states that the Commission is 'fully associated' with CFSP, but the centre of gravity in this respect is clearly in the Council of Ministers.

Once this basic decision was taken, institutional growth quickly set, fuelled by the wars in Bosnia and Kosovo which implied further pressure on the EU to create the institutional capability to address foreign crises swiftly and concertedly. At the end of the 1990s, this institutional architecture was indeed transformed, with Javier Solana serving as a decidedly pro-active and high-profile High Representative (HR), supported by a policy unit (initially designated as 'Early Warning and Policy Planning Unit'). The

Council has also appointed a number of special envoys to represent the EU in crisis areas such as Afghanistan, the Middle East and the African Great Lakes region.

The most recent and far-reaching development has been the creation of military structures in the Council secretariat. As part of establishing a distinct EU defence capability, the Council secretariat has taken over significant parts of the Western European Union (WEU) secretariat (with Javier Solana also acting as WEU secretary-general), the creation of a new committee structure (Political and Security Committee, Military Committee) and the establishment of the EU's own military staff. The latter is headed by a German general, deputised by a British general, acting as the director-general of the EU military staff, who is attached to the private office of Javier Solana. In this case, as with most of the appointments in the new posts in the area of CFSP and military staff have been filled with officials seconded from national foreign and defence ministries. This increase in the incidence of secondment adds a further dimension to the impact these developments have had on the Council secretariat.[12]

Foreign and defence policy may not primarily be about legislation. In most cases, diplomacy aims to regulate behaviour through declaratory acts rather than through law. In fact, the most frequently used instruments in CFSP are 'CFSP statements', which are usually issued by the Presidency on behalf of the Council. There are about 200 such statements annually, and clearly the almost daily issuing of such statements requires co-ordination across national positions as well as an awareness of the EU's case history with respect to particular countries or issues which are the object of CFSP statements. The need for 'advice' from the CFSP case officers in the Council secretariat does have an important role to play, in particular given the significance of the actual wording of statements in a diplomatic context. Diplomatic statements or declarations are issued not just from the Presidency, but also from the CFSP machinery directly. Above all, the speeches, statements and interventions made by Javier Solana himself are part of the overall diplomatic output of the European Union, and their impact in third countries may be the same, if not greater, than the formal Presidency statements. And beyond formal statements, the HR and his CFSP staff make policy in their dealings with third countries, interpreting and implementing common positions agreed upon by the member states.

However, while the Council secretariat may be quite close to the process of drafting and issuing statements and decisions, it often finds itself rather distant from the 'ground', that is, the third countries which may be the object of the Union's attention. In this respect, the absence of direct access to diplomatic missions is a shortcoming which is keenly felt in the Council secretariat. The fact that member states as well as the Commission have delegations in most countries provides them with privileged access to information required for effective action, and in this respect the Council secretariat relies on assistance and co-operation—not always forthcoming—from these other actors.

There is a legislative angle to the CFSP. In fact, there is a long list of 'legislative acts' in the area of CFSP, including decisions such as those on the appointments of special EU representatives, the sending of monitoring missions, the imposition of economic or other sanctions, and the like. The CFSP has produced hundreds of such acts since 1993, a trend facilitated by the possibility of using qualified majority vote under the umbrella of previously agreed 'common strategies' of which there are currently three (relations with Russia, Ukraine and the Mediterranean, respectively).

It may be worth recalling at this stage that the earlier assessment of the Council secretariat's main influence in policy-making in the first pillar and in treaty reform was reactive—it could only bring its influence to bear on decisions which other actors (in particular the Commission) had brought onto the agenda. With respect to the second pillar, that feature is also very different, in that proposals or recommendations for policy may come from a number of actors, including from the HR himself—a feature of the institutional structure of which Javier Solana has made frequent use.

Much of the history of foreign policy co-ordination in the EU has been about the search for a distinct institutional identity of the EU in the international sphere. Having largely achieved this aim in the trade sphere, it is still lacking a similar, distinct identity in the foreign and security field. But significant advances have been made in this respect over the past decade, and the institutional resources available for common EU action in foreign policy are now much more favourable towards this long-standing goal of European integration. If a perception of its identity is still lacking, in particular with respect to major global crises (*vide* the image of disunity with regard to the stabilisation force for Afghanistan resulting from the Laeken summit), it is due to the lack of substantive agreement among national governments and the absence of political will to achieve such agreement rather than the lack of institutional resources. What is evident from the status quo of the decision-making in the CFSP field is that a perception of EU identity, if and when it does emerge, will centre around the work of the HR, the policy unit and other parts of the Council secretariat.

The Council secretariat's activity in the CFSP area is further complicated by two particular issues. First, there is the need—indeed the demand of the treaty—to maintain coherence between the different pillars of EU policy-making. This is a challenge since the achievement of such coherence requires not only the management of linkages between first pillar matters (in particular trade, development and competition policies) and second pillar matters in the foreign policy and security field, but also the close co-ordination of activities between the European Commission and the Council secretariat, given their shared responsibilities in the second pillar.[13]

A second, but related, problem concerns the issue of *transparency*, or, as many would argue, the lack of it. The Council of Ministers is, together with the other EU institutions, formally committed to an agenda about the achievement of greater transparency.[14] However, the Council has been repeatedly criticised—by the European Parliament and the European Ombudsman as well as by other bodies—about its tardiness in implementing more ambitious rules of procedure that would facilitate greater transparency.[15] Just as there are calls for greater transparency, there is also the need for greater secrecy as the Council secretariat—its staff and its offices—accumulates increasingly sensitive tasks in the security and defence field. The Council secretariat's lack of procedures, facilities and resources has led to problems in the past[16]—a situation that has driven Javier Solana actively to pursue the development of an internal security reform of the secretariat. This involves both the relocation of staff occupied with sensitive tasks to a new, secure building outside the main Justus Lipsius Building as well as the creation of a classification regime for secret EU documents.[17] This so-called 'Solana Decision' brought the Council of Ministers in line with the current practice in NATO, but it does fly in the face of the wider transparency agenda. As such, it proved to be a highly controversial measure, leading to protests from civil rights groups as well as

to legal disputes with the European Parliament and with the minority of member states which opposed this measure.[18] The conflicting demands of transparency and secrecy—and the wider aims of achieving greater legitimacy in the eyes of the European citizens on the one hand, and greater credibility in the eyes of the defence community in Europe and in the US—are an important and continuing strain on the institutional integrity of the Council secretariat.

The Union's rapidly expanding agenda in the area of justice and home affairs (JHA) has also presented the Council secretariat with new challenges. In addition to problems similar to the second pillar—incorporating new staff and administrative cultures, developing expertise in new policy areas—there has also been a particular challenge: the provision in the Amsterdam Treaty giving member state governments the right to initiate legislative proposals.[19] Governments seeking to make use of this power quickly discovered the need to involve a central authority in the drafting of such proposals, given their lack of experience in this field. Thus also in this respect the Council secretariat has had to develop new skills in terms of co-ordinating different member state positions and assisting individual governments to advance their legislative projects. This in turn has required co-operation with the Commission's DG for JHA, especially since the Commission is gradually taking over sole responsibility for proposing legislation in this field.

CONCLUSION

The preceding sections have demonstrated the degree to which the Council secretariat has been at the heart of some of the key developments in the past decade. The secretariat is playing an increasingly important role in the mediation of different member state positions in the Council, and in the running of the wider, inter-institutional process in the EU's legislative process. In doing so, it relies on important resources to which other actors have only limited access: legal expertise in the highly complex and technical area of EU legislation; the bureaucratic memory of past decisions and proposals, which may provide precedents for or against new legislative or administrative initiatives; the membership of its staff in the Brusselscentred informal policy networks; and the privileged access secretariat staff possesses vis-à-vis the Presidency.

These factors are complemented by some of the structural features of EU governance in which the work of the Council secretariat is embedded. These include the permanency of its presence in the many fora of deliberation and decision-making within the Council structure, especially against the background of a rotating Presidency presenting the Council secretariat staff with new and often inexperienced 'customers' every semester. Another is the privileged position it enjoys in terms of providing deliberation ministers or national officials with legal advice.

After decades of institutional stasis, some of these arrangements have come under closer scrutiny, and some have actually been changed. For example, the decision at the Nice European Council to discontinue the past practice of staging European Council meetings in the country holding the Presidency and instead have European Council meetings at a permanent location in Brussels. It was one of the last-minute decisions at Nice (and one of which apparently not even all heads of state present were aware) and

has widely been interpreted as a trade-off to appease Belgium for its loss of voting power parity vis-à-vis the Netherlands. This development may, however, also be in the interest of the Council secretariat as it provides further impetus to a shift of decision-making from national capitals to the centre. The impact of the proposed departure from the practice of the rotating Presidency is uncertain.

As we have seen, the Presidency has provided the Council secretariat with an important opportunity structure, creating a constant sequence of national ministers and officials who are dependent on advice from, and guidance by, the Council secretariat. However, there are now suggestions that the format of the Presidency will have to change and that the operation of the Council be streamlined.[20] It is difficult to see how the Presidency, which has occupied such a central place in the history of the EU, could be replaced. If the powers of setting the Council's agenda and chairing its meetings were to be handed over to the Secretary-General, this would constitute a further boost to his (or hers), and the institution's, importance in the EU's legislative process. However, other solutions that would rely on more systematic presence of member state representatives—such as a permanent Council of European ministers—would have the opposite effect. The same is true for some of the ideas which are currently being discussed in the context of the Future of Europe debate: the further reduction in the number of sectoral councils, greater transparency in ministerial councils and the 'democratisation' of the treaty reform process. All of these threaten the privileged position the Council secretariat has occupied in the past.

The debates on a European Constitution that have been conducted within the Convention have special relevance here for the future development of the Council secretariat. The old schism between inter-governmental and supra-national solutions to the dilemmas posed by European integration is increasingly expressed in terms of greater powers to either the Commission or the Council, with the latter appearing to gain the upper hand. Increasingly, there seems to be consensus among most Convention members that the Council secretariat rather than the Commission needs to be strengthened and can constitute a more reliable actor at the European level. In the process, 'inter-governmentalism' is being re-defined: rather than denoting the interaction among governments, it is increasingly understood as executive responsibility residing with the Council.

The twist in this context is the proposed creation of a President of the European Council,[21] which would replace the rotating Presidency and give greater visibility to the Union, externally and internally. Presumably this would be a political appointment at the highest level—a 'Javier Solana plus'—and would imply a term of office of 2.5–5 years. The Constitutional Treaty, the basis for the 2004 IGC, also proposed a European Foreign Minister, accountable to the member states, but at the same time Member of the European Commission responsible for the EU's external relations.

The impact of such changes on the Council secretariat is an interesting question. At first sight the creation of such a new post would seem to imply a further strengthening of the Council secretariat's grip on power. However, at second sight one can see how such institutional innovations may work against the influence of the secretariat. Earlier the point was made that the actual input of the secretariat relied to a large extent on the need of the Presidency for advice, which in turn was the result of the short term and frequent change in the Presidency.

The creation of more permanent structures—a European Council President and a European Foreign Minister—would thus limit the influence that officials in the secretariat would have over the legislative process. In addition, the proposal to have extended presidencies for individual sectoral councils may further add to this dynamic.

The EU is clearly in the midst of important reforms occurring at a number of levels: the debate about the nature of European governance in the wake of the Commission's White Paper on the subject, the reform of the Council's working methods which had been prepared by Javier Solana for the Seville European Council,[22] and the Constittional Treaty drawn up by the Convention preparing the IGC 2004. Each of these is bound to have a major impact on the role of the Council secretariat. This statement, in itself, is testimony to the heightened role the secretariat has gained in the course of European integration during the 1990s and early 2000s. Rather than being merely the object of reform, however, the Council secretariat is a subject in the on-going reform negotiations. The Council secretariat has moved out of the shadows to become a recognised player in the EU's legislative and treaty reform processes.

NOTES

This article is in part based in part on interviews conducted with officials in the secretariat of the Council of the European Union, the European Commission and the permanent representations of some member states. The author is grateful to those officials who have provided insights and information into the work of the Council secretariat.

1. For a general discussion of the organisation and the role of the Council of Ministers see M. Westlake, *The Council of the European Union* (London: Catermill, 1995), F.Hayes-Renshaw and H.Wallace, *The Council of Ministers* (London: Macmillan, 1997); P.Sherrington, *The Council of Ministers—Political Authority in the European Union* (London: Pinter, 2000), and T.Christiansen, 'The Council of Ministers: The Politics of Institutionalised Intergovernmentalism', in J.J.Richardson(ed.), *The European Union—Power and Policymaking* (London: Routledge, 2nd edn., 2001), pp. 135–54.
2. These include, for example, the Committee of Permanent Representatives (COREPER), the Political Committee (political directors of national foreign ministries), the Article 36 Committee (the former K4 Committee) (meetings of senior justice and home affairs officials), the 'Article 133 Committee' (member state representatives shadowing the Commission's conduct of international trade negotiations).
3. See 'Master of his Brief', *European Voice*, 9 Dec. 1999, and 'De Boissieu's Surprise Intervention', *European Voice*, 30 March 2000, for details of his career and political influence.
4. See 'Solana Attacks Decision-Makers', *Financial Times*, 12 March 2002, and 'Top Official Attacks the Way Governments Conduct EU Business', *European Voice*, 6 April 2000.
5. See, for example, 'Shake-up of Staff Causes Friction in Institutions', *European Voice*, 12 Oct.2000; 'Staff Dispute Risks Delaying EU Reform', *European Voice*, 1 April 1999; and 'Senior Official Criticised Over Recruitment', *European Voice*, 20 March 1997.
6. See 'A Calculated Summit for Chirac's Man', *European Voice*, 21 Dec. 2000, for an illustration of the potential influence of Council secretariat officials.
7. See M.Gray and A.Stubb, 'The Treaty of Nice', in W.Wessels and G.Wiessala(eds.), *JCMS Annual Review* (Oxford: Blackwell, 2001).

8. For an examination of the evolving relationship between Commission and Council secretariat, see T.Christiansen, 'Inter-institutional Relations and Intra-institutional Politics in the EU: Towards Coherent Governance?', *Journal of European Public Policy*, Vol. 8, No. 5 (2001), pp. 747–69.
9. See S.Woolcock, 'European Trade Policy', in H.Wallace and W.Wallace(eds.), *Policymaking in the European Union* (Oxford: Oxford University Press, 2000), pp. 372–99, for a detailed description of the interaction between Commission and Council in the area of trade policy.
10. For a discussion of the role of the Council secretariat in the process of EU treaty reform, see T.Christiansen, 'The Role of Supranational Institutions in EU Treaty Reform', *Journal of European Public Policy*, Vol. 9, No. 1 (2001), pp. 33–53.
11. The website of the Convention states that the 'Convention and the Praesidium are supported by a secretariat, which is headed by its Secretary-General, Sir John Kerr, former head of the British Diplomatic Service. The secretariat provides assistance to all members of the Convention on all aspects of the Convention's work, in particular by preparing discussion documents for the Convention, drafting reflection papers, and drawing up syntheses of the debates. It also assists the Chairman, the two Vice-Chairmen, and the "Praesidium". In addition, the secretariat is responsible for the logistic and practical arrangements of the Convention, and is entrusted with organising the activities of the Forum. Its members are drawn primarily from the General Secretariat of the Council, but include also experts from the European Commission and European Parliament secretariat, as well as members seconded from outside the institutions'. See european-convention.eu.int/. See C.Reh and W. Wessels, 'Towards an Innovative Mode of Treaty Reform?', *Collegium*, Vol. 24 (2002), pp. 17–42, for a discussion of various scenarios of the Convention, including the 'minimalistintergovernmentalist one which regards the secretariat (together with the Praesidium) as being the key actor in drafting the "output" of the Convention' (p. 41).
12. See J.Trondal, *The 'Parallel Administration' of the European Commission National Officials in European Clothes?*, ARENA Working Papers WP 01/25 (Oslo: ARENA, 2001) for a discussion of the impact of secondment in the EU.
13. See C.Tietje, 'The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy', *European Foreign Affairs Review*, Vol. 2, No. 2 (1997), pp. 211–33, for a discussion of the implications of coherence in the making of CSFP.
14. See General secretariat of the Council of the EU, *Basic Texts on Transparency Concerning the Activities of the Council of the EU* (Brussels: 2000).
15. See, for example, 'MEPs Set for Court Fight over "Illegal" Council Security Rules', *European Voice*, 5 July 2001; and 'Secrecy Report—Sorry, It's Secret', *European Voice*, 3 Oct.1996.
16. See, for example, 'Security Lapses in Brussels HQ Cast Doubt on EU Defence Plans', *The Guardian*, 19 Feb. 2000.
17. Council of the European Union, *Decision of the Secretary-General of the Council/High Representative for the CFSP on Measures for the Protection of Information Applicable to the General Secretariat of the Council (2000/C 239/01)* (Brussels).
18. See the contributions to the Statewatch 'Secret Europe' website on www.statewatch.org/secreteurope.html.
19. See M.D.Boer and W.Wallace, 'Justice and Home Affairs', in Wallace and Wallace(eds.), *Policy-making in the European Union*, pp. 494–519, for a detailed account of the development of EU competences in this field.

20. See for example ‘Closing Time may be Near for the Presidency Merry-go-Round’, *European Voice*, 24 Jan. 2002, and ‘Blair and Schröder Join Forces on EU Reform’, *Financial Times*, 24 Feb. 2002. At the half-way point in the deliberations of the Convention, there was ‘broad agreement that there must be serious changes to the Presidency,…[but] no indication of consensus on any package’, European Policy Centre, *European Convention End of Term Report* (Brussels, 10 Sept. 2002), p. 5.
21. The proposal for such a Council President is also contained in the draft ‘Constitutional Treaty’ presented to the Convention in October 2003, see Article 15 bis, Praesidium of the European Convention, *Preliminary Draft Constitutional Treaty* (Brussels, 28 Oct. 2002).
22. This review of the Council operating procedures—the so-called Solana report—is based on the earlier Trumpf-Piris report: Secretary-General of the Council of the EU, *Operation of the Council with an Enlarged Union in Prospect* (Brussels, 1999).

Social Pluralism and the European Court of Justice: A Court Between a Rock and a Hard Place

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In today's interdisciplinary academic age, past study of the European Court of Justice (ECJ) appears polarised. On the one hand, a traditional formalist account of the development of European law expressed admiring amazement at the silent juridification of the European Communities, but at the same time equated the ECJ's doctrinal pursuit of 'direct effect' and 'supremacy' with a *de facto* higher legal legitimacy for the European legal order as a whole: 'Tucked away in the fairytale Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a *constitutional framework* for a federal type Europe.'[1] By contrast, politically informed appraisals of the work of the ECJ were not prepared simply to accept that a *sui generis* European law could elevate notions of supremacy to a self-referential *Grundnorm*, endow the European Treaties with a constitutional character and claim for itself a pre-political normative legitimacy. The Court's formalist adjudication was, as per Burley and Mattli, instead a conflict-ameliorating veil to be drawn aside to reveal the dominant political agendas that animated an inherently controversial integration process: 'law functions both as a mask and as a shield. It hides and protects the promotion of one particular set of objectives against contending objectives in the purely political sphere'.[2]

European law was thus host to two dominant dichotomies: (1) law as simple authoritative given versus law as politicised chimera and; (2) law and its courts as a force independent from and governing over all social and political movements versus law as servitor and protector of an individual political agenda. Equally, the two characterisations seemed to represent two irreducible and irreconcilable disciplinary understandings of the nature of law and its place within social and political organisation.[3] For lawyers, the law possessed its own hermeneutic rationale and *telos:* quietly, disregarded by and disregarding of social and political powers, the Luxembourg Court had refashioned its primary legal material, the (international) treaties of the European Communities (EC), into a (constitutional) normative framework of governance that henceforth required the member states of the EC to abide by notions of European legal supremacy. In turn, however, 'realist' political scientists demoted law to the, albeit significant, status of a

'tool' wielded by the 'European powers that be' to effect and to obscure the real-world changes which they required in the political and economic landscape of the EC.

Between facts and norms, however, traditional political science and legal approaches seem nonetheless to have shared at least one thing in common: a strangely reductionist perception of 'lawyers and the law' and a concomitant inability to bridge the gap between pre-political normative orders of governance and the reality of governance in a rapidly changing world. Inexorably pre-conditioned by the peace of Westphalia (or notions of territorial sovereignty), observers of European legal practice had declined to engage in any meaningful investigation of the real-world conflicts inherent to governance in a sphere of on-going integration, had remained complacently trapped within a paradigm of hierarchical legal norms and had simply 'declared' the supremacy of the European legal order over those of the member states. By the same token, however, political science betrayed its realist inability to afford analytical value to the 'factual power of the normative', busying itself with an exposure of the political substance within legal pronouncements, but not looking further to identify the political forces, interests and ideas that law itself might create.[4]

Time and the integration process have nonetheless moved on. In the decades since the law's delighted discovery of the ECJ as an influential machine of legal renewal and concomitant dismissal of such machinery as a political mask, the Luxembourg Court has seemingly lost its central place within an increasingly politicised integration process.[5] Similarly, European law has been duly shocked by challenges to its supremacy,[6] while political science has also been required to concede the continuing influence of the *acquis communautaire* as a governing principle within Europe.[7] Meanwhile, academic study of the ECJ and its law has also become ever more differentiated.[8]

Nonetheless, neither the apparent reduction in the integrationist relevance of the ECJ, nor continuing refinement in the academic methodologies of study applied to that Court, should be taken as an indication that further interdisciplinary study of processes of European adjudication is today any less necessary. Instead, it may be argued that the inherent tensions between the European integration process and our inherited notions of governance within democratic constitutional states now mark the economic sphere of integration to a greater degree than ever before.[9] Burley and Mattli's 'contending' political goals have thus been augmented by an ever more intricate process of legal integration that has itself prised an ever greater number of private interests out of national channels of democratic expression. Concurrently, this self-same process of legal integration and attendant challenge to national political collectivities has intensified the questioning of the modern relevance of the traditional sovereign constitutional frameworks from which courts and law in Western Europe have derived their historical legitimacy.

In other words, the gap between norms and facts has, in Europe, become a chasm. Public concern about a European 'democracy deficit' and the academic scramble to identify new and legitimising 'governance frameworks' for Europe is but a simple reflection of the inadequacy of our inherited state-based democratic constitutional frameworks for the legitimation of the exercise of governing authority, including legal authority, in a real world marked by wide-scale social defection from consolidating national modes of political expression and of corollary failure to establish a supra-national political collective.[10] In this twilight world, the ECJ has an unenviable position.

On the one hand, it and its law contribute daily to the collapse of the hierarchical model of normative order from which it drew, however abstractly, its authority. On the other hand, it must also directly confront the consequences of such collapse, adjudicating between national, supra-national and private political goals in the necessary effort to identify the regulative boundaries between the interests of various groupings in a European arena marked by an unprecedented and unbridled social pluralism.

In a final practical analysis, then, the question also becomes one of who, if anyone, directs the adjudication of the European Court of Justice? Must the notion of the ECJ as a tool of dominant political powers be modified to pay due attention to the fact that the Court may also be forced into partisan decision-making on behalf of increasingly powerful, but hard to identify, private European interests? Alternatively, has the ECJ found a means to insulate itself from all particularism, identifying a mode of legal reasoning that preserves its own constitutional neutrality?

SOCIAL PLURALISM WITHIN THE INTERNAL MARKET

The assertion that the ECJ now finds itself between a rock and hard place, required to act to subdue political and social pluralism within the internal market, but lacking a firm (pre-political) normative basis from which it might educe legitimacy for its actions, derives both from a qualitative change in the substantive nature of the national economic provisions with which integrative European market regulation is confronted and from the unexpected consequences of its earlier jurisprudence.

The European integration process might accordingly be argued to be a victim of its own success. Simply stated, the ever increasing jurisdictional reach of treaty provisions of economic law, such as Articles 81, 82 (competition) and 86 (state aids) has inexorably led European law into confrontation with national regulatory arrangements that, being built upon universal values of social provision, can no longer be tackled exclusively within the realm of economically rationalising technical values. At the same time, however, the judicial elevation of Europeans into ‘European market citizens’ by means of enforceable economic rights has also released a private voice into the European market arena that both challenges national perceptions of universal values and demands the judicial refashioning of provisions of European economic law to reflect concerns and interests released from socially consolidating national political collectivities.[11]

Law as Mask and Shield?

Jurisprudential support for Burley and Mattli’s thesis that the ECJ of the 1980s acted as mask and shield for the political objectives of European policy-makers is easily pinpointed. Perhaps one of the most striking pieces of such ‘protective’ jurisprudence is found in the 1987 competition law case of *Verband der Sachversicherer v. Commission of the European Communities*,[12] whereby the ECJ rejected a German government assertion that it should be free to regulate the actuarially sensitive area of fire insurance through the legislative toleration of private, industry-maintained premium ‘cartels’, on the legalist grounds that ‘Community law does not… make the implementation of Articles 85 and 86 [81 and 82] of the EEC Treaty dependent upon the manner in which

the supervision of certain areas of economic activity is organised by national legislation' (paragraph 23).

This stark piece of judicial reasoning is seemingly best proof of an underlying assertion that it was not the absence, but the proliferation of politics that led to the elevation of the ECJ to an instance of last 'substantive' decisional resort in the battle to reconcile the irreconcilable:[13] the struggle definitively to master the opposing views and interests of centres of political power that possessed—in self-referential terms at least[14]—their own, normatively and logically derived, basis for legitimate political action. Accordingly, in the setting of the nascent European market, a potentially fatal political impasse between the 'equal' claims of the German legislature to political-economic self-determination and of European institutions to treaty-derived (economically rational) managerial supremacy over the regulatory framework of the European market, found itself channelled into the adjudicatory machinery of the ECJ; a constitutional-like Court that was able—by dint of interpretational sleight of hand—to dilute conflict, taking care both to secure the supremacy of the European legal order and to ensure the substantive supremacy of rationalised European economic reasoning through the seemingly purely formalist notion that Community competition law (now Articles 81 and 82) simply did not admit of traditional forms of co-operative public/private economic regulation at the national level.

Law in a Socialised Internal Market

All such masking formalism apart, the ECJ of the 1980s remained privileged in that European economic law had yet to come into conflict with values that could no longer be tackled within the paradigm of a rationalising European political economy. Although the Court's judgement in *Verband der Sachversicherer* deployed a self-evident hermeneutic legalism to avoid the question of why the self-declared supremacy of the European legal order should trump a democratically legitimated scheme of national economic governance. The conflict between political powers within the EC was one that might, by virtue of residual stagnatory corporatism within the German market, still admit of winners and losers.

In other words, while the use of premium-setting cartels to guard against market-endangering price fluctuation in the private fire insurance market had long been a feature of individual national markets, such schemes entailed no universal social values beyond a nodding and arguably tired commitment to traditional patterns of interwoven public-private regulation.[15] Market corporatism was an expendable historical legacy. The danger of market failure within the fire insurance market could instead be combated through the application of technical schemes of rationalising regulation, such as the imposition of solvency margins.[16] Within such a constellation, the guiding European principle of 'proportionality' could thus be deployed to ensure that disturbances to competition within a European insurance market might be minimised, while a primary German governmental goal of market stability would still be ensured through the introduction of substitute regulatory mechanisms. Certainly, the ECJ had been called upon to adjudicate between plural centres of political power, but it had been called upon to do so in relation to a substantive question of market regulation that might be solved with reference to market values alone.

By contrast, however, the inexorable *telos* of European legal integration has now brought European economic law into confrontation with an abiding national economic corporatism which has less to do with an outmoded and seemingly inefficient desire to maintain comfortable governing relations between public and private sectors, and more to do with the refashioning of private market logic to accommodate quasi-private enterprises that imitate, and sometimes compete with, their purely private counterparts in the vital effort to ensure universal social benefits. Thus, in a recent raft of exemplary cases, the European Court has been required to adjudicate on the compatibility with European competition, state aids and freedom of service provision of French governmental sickness and maternity schemes *(Poucet and Pistre)*,[17] of Dutch occupational pension schemes established by means of collective bargaining *(Albany)*[18] and of Dutch pension schemes established by means of a profession-based agreement *(Pavel Pavlov)*.[19]

In such cases, the Court must now form a judgement upon the status of European law in relation to a segment of the national economy traditionally characterised by an historical tension between two competing principles of insurance provision, the first universal and solidarity-based, providing benefits for all, regardless of income, personal characteristics and risk posed, and the second differentiated and liberal, providing benefits in line with premiums paid and the risks actuarially represented by an individual insured. Albeit operating within private market structures, solidarity-based insurers bolstered by governmental regulation enforcing widespread membership of individual schemes represent a 'socialisation' of pure market values in line with a constitutional-political commitment to universal social insurance. To the extent that solidarity-based schemes would fail in direct competition with private insurers, the logic of the private market is manipulated and socialised through governmental imposition of compulsory premium payments that cushion against bad risks.

In this socialised market sphere, the guiding European principle of proportionality inevitably loses its (rational-economic) decisional force. The substantive issue of adjudication is thus no longer one of the identification of the appropriate market mechanisms that both solidify competitive values and guard against market failure. Instead, the matter is a very different, and ultimately political, one of the (democratic) identification of the legitimate limits to market rationality.

THE INSURANCE INTERFACE AND THE LIMITS TO FORMALIST ECONOMIC RATIONALITY

Required to adjudicate at an 'insurance interface' where private and public philosophies of social provision are interwoven with and compete against one another, the ECJ has not, however, merely been drawn into direct consideration of the political. Instead, the European insurance interface is also host to the visible but challenging consequences of the second 'success' of the integration process, the judicial empowerment of individual European citizens.

Social Pluralism, Legal Indeterminacy and the Battle to Define the Meaning of European Economic Law

The legacy of the ECJ's own formalist market-creating jurisprudence is a body of European economic law that is firmly anchored in economic rationality and possesses only a very indistinct, even dismissive, relationship with the (national) political processes that have historically (democratically) limited market rationality.[20] Further, however, a modern conflict of laws mechanism,[21] whereby European law might seek to reverse its earlier relationship with member state political orders by simply ceding to national law the right to regulate those economic sectors within which universal social values restrict market rationality, seems to be of limited value for two reasons. First, since a language of European economic law predicated upon the market-constructing principle of supremacy is semantically dedicated to finding the rational-technical limits of European provisions and is so devoid of expressions that might facilitate the judicial identification of the normative primacy of the national political economy.[22] And, second, since the challenge to the national fashioning of a political economy supportive of universal values comes not only from the internal logic of European law, but also from individual Europeans who are drawn to use their rights as European (economic) citizens in an attempt to secede from the national consensus on universal welfare provision.

This final point proves determinative. In the case of *Albany*,[23] for example, a Dutch textile firm, acting in its guise as 'private individual', called both upon European competition law and its European right to purchase services across national frontiers in order to challenge not only a collective bargaining agreement among workers in the Dutch textile sector to establish a joint pensions scheme, but also Dutch government provisions requiring textile firms to affiliate to that scheme, as well as earlier ECJ jurisprudence (notably, *Poucet and Pistre*), defending national corporatist arrangements from the rationalising rigour of the European legal order.

Confronting the ECJ with its 'own' right-bearing politico-legal constituency of individual Europeans, such 'socialised' market cases thus unveil a twofold indeterminacy in the provisions of European law. As noted, a formalist European law predicated upon rational market values loses its inherited meaning in relation to a substantive matter of dispute that can only be settled with reference to political interests and values. Equally, however, a European Court that now seeks to fill its formalist provisions with political and social meaning must choose between the interests and values represented by a set of competing, sometimes indistinct and sometimes novel political constituencies.

The latter task is a far more complex one than the mere identification of distinct spheres of competence for European and national powers. Instead, where the national collectivity has become porous, the adjudicative question becomes one of whether European, national or evolving private values should prevail and find expression in European law. Under conditions of social pluralism, the provisions of European law have become no more than empty shells around which various supranational, national and private interests revolve in an effort to gain primacy for their views and so determine the very substance and meaning of the European legal order.

The Social Insurance Cases: A Status Quo in the National Political Collectivity?

Indicative both of the failure of political science to give due value to the factual power of the normative and of law's helplessness in the face of the normative power of the factual, the legally stimulated growth of a rightsbearing constituency of European citizens prepared to challenge national political collectivities and the substance of European law poses an immediate and powerful threat to one of the most abiding of (internal) legal values, judicial impartiality.

With the collapse of all formalist pretence and in the continuing absence of an uncontested pre-political scheme of supra-national governance from which it might draw clear (unitary) political direction, judgements giving social substance to European law cannot but give primacy to individual and controversial (whether supra-national, national, private or otherwise) political interests within the indistinct and multi-faceted European polity. Seen in this potentially partisan light, however, the ECJ's seemingly very pragmatic effort to ensure that dogmatic supremacy of European economic law notwithstanding, the *status quo* within the management of social insurance funds will be maintained, is not only understandable, but is also very prudent. A fluid legal grammar of three-fold differentiation applies, exempting social insurance from the full rigours of European law on alternating economic and social grounds.

Poucet and Pistre:[24] Solidarity, Capitalisation and the Rational Economic Delineation of the European Market Jurisdiction

The ECJ's jurisprudence on solidarity-based insurance schemes is thus governed by a distinction between (i) solidarity schemes that might, using macro-economic reasoning, be deemed to have no place within the European legal order since they lie 'outside' the market; (ii) solidarity schemes which lie 'inside' the market, but which might nonetheless be exempted from the application of Articles 81, 82 and 86 by virtue of the 'social' goals which they pursue; and (iii) solidarity schemes which fall firmly within the jurisdiction of European competition and state aids law, but which might also be excused from Judicial review since they are deemed, on micro-economic grounds, not to affect cross-border competition.

The facts of *Poucet* and *Pistre*, cases involving statutory schemes to provide social benefits to self-employed and skilled workers, thus provided the ECJ with ample economic room to declare that the bodies administering the schemes were not 'undertakings' within the meaning of EU competition and state aids law. Since both schemes operated upon a solidarity principle of provision and also lacked the element of 'capitalisation' characteristic of a private market, neither the schemes themselves were to be understood as falling under EU competition law, nor was government regulation enforcing payment of contributions to be deemed a state aid.

Albany:[25] Solidarity as Legitimate Interest within the European Legal Order?

The facts of *Albany*, by contrast, were far less conducive to adjudicationavoiding manoeuvres. Stichting Bedrijfspensioenfonds Textielindustrie, the pensions scheme for Dutch textile workers established by collective bargaining agreement, might well have been based upon solidarity principles, but it was also undoubtedly capitalised. Thus, while the scheme was less profitable than its private market counterparts, it nonetheless

competed directly with them, financing its benefits through the capital market. It aped private market mechanisms to the degree that it could not but be designated as an 'undertaking' within the terms of European law.

Nonetheless, the ECJ was clearly cognisant both of the societal value of semi-private solidarity-based pension schemes and of the danger that such schemes would fail were they to be subjected to a competitive regime. This would make possible cream-skimming by the private market of the premiums of wealthier and healthier insureds which provided cross-subsidisation for those bad risks who would otherwise face prohibitive pricing:

> [I]f the exclusive right of the fund to manage the supplementary pension scheme for all workers in a given sector were removed, undertakings with young employees in good health engaged in nondangerous activities would seek more advantageous insurance terms from private insurers. The progressive departure of 'good' risks would leave the sectoral pension fund with increasing responsibility for an increasing share of 'bad' risks, thereby increasing the cost of pensions for workers, particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities, to which the fund could no longer offer pensions at a reasonable cost. (paragraph 108)

Happily, however, the ECJ's desire to exempt the scheme from competition law was also to find authoritative support, not merely in national traditions supportive of collective bargaining agreements designed to improve 'employment and working conditions',[26] but also in the nascent reflection of this member state tradition within provisions of the European legal order encouraging collective bargaining agreements at European level (Articles 136–43).

Accordingly, where both national and European polities coalesced in their commitment to collective bargaining procedures, the Court might confidently perpetuate the apparently overwhelming consensus on universal social provision, disregarding the private challenge to the national corporatist collectivity:

> [I]t therefore follows from an interpretation of the provisions of the Treaty as a whole *which is both effective and consistent* that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, *by virtue of their nature and purpose*, be regarded as falling outside the scope of Article 85(1) [81(1)] of the Treaty. (paragraph 60, emphasis added)

Pavel Pavlov:[27] A Final Micro-Economic Distinction

Finally, however, the facts of *Pavel Pavlov*, a private challenge against a pensions scheme administered by a professional association of Dutch medicinal practitioners, were to send the ECJ scurrying back to microeconomic arguments in order to avoid direct confrontation with the political values inherent in social insurance provision.

Here, the character of Stichting Pensioenfonds Medische Specialisten differed vitally from its national counterpart since, as an association established by professionals, it lacked the status of a fund created by a collective bargaining agreement and thus of a

body given an implicitly privileged position under EU law (Articles 136–43). Hence, while the selfsame cream-skimming and cherry-picking arguments were to apply:

> The occupational operates on the basis of the principle of solidarity… apparent from the fact that the level of contributions payable to the fund bears no relation to the age at which a member began practising or his state of health when he became a member. Such solidarity makes it essential that membership of the supplementary pension scheme is compulsory for all members of the profession. Otherwise, if good risks did not participate in the scheme, the ensuing downward spiral would jeopardize its financial balance.

The ECJ was unwilling to give the fund the ringing endorsement its industrial equivalent had received. Instead, a distinct shift to the conditional is to be noted in the Court's language:

> It is true that the pursuit of a social objective, the abovementioned solidarity aspects and the restrictions or controls on investments made by the Fund may render the service provided by the fund less competitive than comparable services provided by insurance companies. Although such constraints do not prevent the activity engaged in by the Fund from being regarded as an economic activity, they *might* justify the exclusive right of such a body to manage a supplementary pension scheme. (paragraph 118, emphasis added)

Equally, the Court's more subtle use of language was matched by its smooth avoidance of the issue of whether competition law could be used to disrupt the activities of the fund. The judgement thus noted that, while the fund was indeed an undertaking within the terms of the Treaty (paragraph 119), there was no existing evidence that it had abused its dominant position within the market (paragraphs 120–30). *Summa Samarium*, Mr Pavlov's private challenge to his own professional association and to the national political collective which underpinned it would nonetheless fail upon microeconomic grounds.

POLITICAL PLURALISM AND LEGAL DETERMINACY?

Of itself, political pluralism is not a constellation unknown to the law. Indeed, most legal orders have often been confronted with split polities characterised by strong division between competing centres and institutions of political power. Nonetheless, nascent social pluralism within the EU appears to set the law a particular challenge, resisting all disciplining theories and strategies designed to recapture political pluralism within extant orders of normative governance, turning pluralism to the service of legal determinacy and so transforming political conflict from the troublesome object of adjudication into its guiding principle.

At European level, for example, theories of 'ordo-liberalism' and notions of the regulatory state have proven their historical worth by refashioning 'real-world' European pluralism within traditional constitutional structures: (i) ordo-liberalism, founded in the historical experience with destructive pluralism within the Weimar Republic, cocooning private market forces within a 'European Economic Constitution', and thereby endowing European Law with the highly determinate functions of regulating and protecting the market from destructive political contention;[28] and (ii) regulatory theory, building upon functionalism in its efforts to extend a guiding (Madesonian) precept that power is best controlled if split between varied sovereigns and 'delegated' to plural ranks of 'non-majoritarian' organisations, or 'the regulatory state'.[29] Providing a comprehensively normative analysis of European law's jurisprudential and institutional development, the two analyses provided timely reminders to complacent, hierarchically minded European jurists that legal expressions of supremacy must always be clearly educed from and, more important, themselves be bounded by normative structures reflective of 'real-world' conditions. Additionally, however, they entailed an effective rebuke to political scientists who could identify no normative direction behind law's 'political' veil.

Ernst-Joachim Mestmäcker's ordo-liberalism confronted political pluralism within Europe by extending the traditional public/private sphere, delineating the role of individual rights into the economic arena, transforming the otherwise seemingly neo-liberal pronouncements of the ECJ into positive expressions of a higher normative (constitutional) commitment to remove the economy from a sphere of political contention and to leave to the law—through the medium of the application of a regime of free competition—the vital 'liberal' regulatory task of the preservation of creative individual economic freedom.[30] Law, not as chimera, deployed in the service of a neo-liberal European orthodoxy, but law as independent constitutor and guardian of liberal society beyond the nation state.

By the same token, Giandomenico Majone's elevation of the 'agreement' of the member states to pool their sovereignty to achieve delineated (economic) aims to the status of a (traditionally majoritarian) regulatory system, represented a constitutional commitment to regulate the market in line with its own values and in splendid isolation from subversive political forces. Presenting us with the welcome spectacle of a political scientist educating the law on its constitutional roots, the theory of the regulatory state also sought to correct political science: far more than a veil for politics, the law was instead a normative bulwark, defending the decisional powers of a democratic polity from the anti-democratic antics of its politicians.[31]

Nonetheless, the very strengths that define both ordo-liberal and regulatory approaches have proven to be their weaknesses in relation to the new European social pluralism. Rooted in the real-world recognition that the European polity lay beyond the hierarchical structures of the nation state, and similarly dedicated to finding the governance order that would provide for the transmission of traditional constitutional sovereignty beyond its natural national habitat, each approach contained its own normative limitations. On the one hand, ordo-liberalism preached that the escape from destructive pluralism by means of economic constitutionalism had its necessary corollary in a clear refusal to introduce (socially-politically conceived) industrial policy into the now autonomous sphere of market relations. On the other hand, theories of the regulatory state likewise circumscribed their legitimating power to those sections of the economy that could be

usefully regulated in the absence of redistributive policies necessarily subject to on-going political direction.[32]

Concerned to reflect real-world political conflict within a sphere of on-going integration, yet determined to maintain a legitimising normative order, ordo-liberalism could thus not but show bitter disappointment as an autonomous market, supposedly built on liberal principles, flexed its own constitutive muscles to burst the bounds of liberalism and engage instead in substantive policies verging upon the industrial.[33] Likewise, in the face of a nascent and assertive European polity, shunning a majoritarian dedication to the regulatory state and with political agendas of its own, regulatory theory might be argued to have lost its persuasive power.

Moving between the real-world and the normative, each approach thus also demonstrates that, no matter how well-conceived, normativity can also prove to be fatally static. Schemes of normative governance founded within the real historical challenge posed by European integration to the democratic nation state nonetheless provide no guidance to the ordering of current European social pluralism. By the same token, of course, it may be argued that social pluralism might never be captured and ordered within a normative lens. Seen in this light, however, the set of exclusionary arguments deployed by the ECJ could bring us full circle to Burley and Mattli's realist argument that European law is no more than a veil and a shield behind which a political agenda is pursued.

THE SEARCH FOR SUSTAINABLE NORMATIVITY

The social insurance cases as chimera? The ECJ as servitor and protector of a particular and somewhat elitist view of the juridified EU polity as a neatly balanced truce between rationalising (European) economic aims and a continuing interest in the subordination of private aspirations to the 'oppression' of homogenising national and sub-national collectivities?

Certainly, the bare decisional facts of *Poucet*, *Albany* and *Pavlov* might provide a basis for arguing that the ECJ has deviated too readily from its own particular constitutional vision of a supreme legal order based upon a revolutionary endowment of individual national citizens with rights enforceable beyond the nation state: in the final analysis, no individual challenge to national corporatism has succeeded. Nonetheless, the supposed silencing of a once heroic, but now troublesome, subject of European law the survival of national corporatist arrangements might represent must nonetheless be balanced, not only against the Court's expansion of its own economic jurisdiction to encompass social insurance schemes, but also against various individual elements within the judgements hinting at the Court's on-going struggle to establish a durable normativity for its own jurisprudence.

The Normative Power of Factual Analysis

In other words, the Court's action in bringing social insurance schemes within the purview of European competition law not only confirmed that body's preparedness to address the concerns and interests of its own private politico-legal constituency, but also

reflected its long-standing commitment to the founding of European law in careful and accurate factual analysis. The Court's commitment to rigorous factual review might thus be argued to entail a normativity of its own, at least to the degree that European law might fairly claim to be rooted within the 'real world', and to be cognisant of all social and political factors that may play their part in justifying the 'appropriate' or 'correct' decision with regard to the comprehensive facts of a problem posed. Seen in this light, the Court's easy movement between the macro-economic language of market limitation, the semantics of social solidarity and the grammatical minutiae of micro-economic market shares is less a reflection of the elliptical use of sources to avoid contentious decision-making and more a positive polyglot expression of the European legal order's de-mythologising 'legal secularity'.

Granted, the Court's historical commitment to economic rationality had its counterpart in a failure to give adequate value to democratic expression. Nonetheless, the flipside of the proportionality principle was always the demand that a national legal order move beyond its socially detached hierarchical normativity to justify the 'real-world' relevance of its prescriptive norms. Gone were the days of reverential acceptance of legal norms that protected hidden particularist interests; instead, European law would draw aside the national regulatory veil obscuring outdated, inherited and stagnant arrangements.[34] Re-applied to the jurisprudence of the ECJ itself, the 'realist' prescription that authority can only be claimed under conditions of legal and political pluralism, if rooted in substantive fact, gives rise to a Court that now appears to be prepared to step beyond any simple assertion of its folkloric supremacy to seek and explicitly apply convincing social and economic rationale for its decision-making.

In other words, legal secularity, or the patiently pragmatic process of review and analysis that now characterises much of the ECJ's jurisprudence, though not easily captured in theoretical terms and likewise leaving the Justices open to charges of meddling in subject matters they are ill-equipped to master, may nonetheless be argued to offer an analytical basis for normative governance: legal language of comprehensive enquiry dedicated to the rooting of European law in real-world rather than imagined governance structures.

However, all positive de-mystifying effects apart, 'legal secularity' cannot of itself furnish the final balance between incommensurate regulatory rationales: in the case of social insurance, 'the facts alone' will not effect a reconciliation between competing economic rationalities, social values and private claims to economic justice. Rather, with a closer eye on the facts of *Albany*, it may be argued that the European Court has breathed new life into ancient principles in order to begin to establish a specifically legal framework of sustainable normativity from which it might draw final authority.

The Shared Legal Language of Equity

Here, immediate attention is drawn to the simple fact that *Albany* did in fact give voice to the view that something was rotten both within the corporatist management of Dutch social values and within national law governing collective bargaining agreements within the Netherlands. Granted, by the time of the ECJ hearing, Stichting Bedrijfspensioenfonds Textielindustrie did provide a final pension in line with the norm offered within the Netherlands. However, at the time that Albany had chosen to augment

its own workers' pensions, joining a private fund in 1981, its services were far from optimal, with the fund yielding only a *pro rata* pension of 200 Dutch guilders following 50 years of service. Similarly, however, Dutch law on the administration of collective funds had proven to contain various vital *lacunae*, the most pressing of which was the fact that although companies that had established a pension fund six months prior to the establishment of a collective fund were granted an automatic right of exemption from the affiliation duty, firms wishing to leave the fund after that date might do so only at the discretion of the management of the fund. Although the Dutch Insurance Board played a major part in overseeing the competence and business-worthiness of funds and was likewise called upon to give an opinion in the event of a proposed withdrawal, its decisions in the latter case were not binding upon the individual fund managers.

Accordingly, Albany's challenge originated in the 1989 decision of the fund not to allow a withdrawal by Albany, notwithstanding the Dutch Insurance Board's opinion that, in view of the long-standing benefits Albany now enjoyed in its private insurance relationship, withdrawal should be allowed.

Seen in this light, the inspiring legal moments in the judicial process surrounding Albany's claim are to be found (i) in the referring Dutch Court's statement that relations between a sectoral pension fund and its members are governed by requirements of 'reasonableness' and 'equity' as well as by the general principles of sound administration, so that 'considerable' weight should be given to the opinions of the statutorily appointed Insurance Board on exemptions (*Albany*, paragraph 35); and (ii) in the ECJ's sting in the tail stipulation that:

> national courts adjudicating, as in this case, on an objection to a requirement to pay contributions must subject to review the decision of the fund refusing an exemption from affiliation, which enables them at the least to verify that the fund has not used its power to grant an exemption in an arbitrary manner and that the principle of non-discrimination and the other conditions for the legality of that decision have been complied with. (paragraph 121)

In other words, the true inspirational power of *Albany* lies in the process of judicial dialogue between national and European courts, facilitated by the existence of individual European rights and by the underlying rationalisation demands of a European market order. The language of the process of judicial dialogue is constituted by the shared and ancient legal grammar of 'reasonableness', 'equity', 'non-discrimination' and the demand that authoritative decision-making never be 'arbitrary'. In this regard, it is an 'original' language of law which gives voice to 'true' pluralist interests and allows them to challenge inert, unthinking and overly complacent collectivities, not through the promotion of positive and at times socially destructive individual rights, but through legal pre-conditions, or stipulations for the manner in which political-legal debate between competing interests and values is to be conducted with due regard to the interests of all concerned.

CONCLUSION: AN ANCIENT AND MODERN NORMATIVITY?

Prey to a particularist series of European, national, public and private interests and values, the final adjudicator upon a law whose indeterminacy has now been exposed to full public gaze, the ECJ might nonetheless be argued to be seeking a sustainable normativity—or legitimising a higher legal framework for its judgement—in an ancient legal grammar of equity pre-dating all hierarchical frameworks of governance founded in notions of state sovereignty.

At the more prosaic level of consistency in an emerging European constitutionalism, such a legal grammar serves to give a measure of indirect voice to the Court's own constituency of rights-bearing Europeans; locating the 'political' persona of the European economic citizen, not (somewhat crudely) within a 'supreme' framework of incontestable European economic rights, but rather, in a 'proceduralist' twist, within the politico-legal collectivities of the member states. While the juridical primacy of the European economic citizen might be argued to have found its necessary limits in restrictions placed on the economic rationality of the European market order, the ECJ has nevertheless re-affirmed its continuing commitment to its own politco-legal constituency of right-bearing Europeans through the strengthening of its 'organic' links with national legal orders.[35] Shifting from its own *sui generis* grammar of supremacy to a shared European grammar of 'equity', the ECJ has begun to re-define its links with national legal orders; the initial offer to national courts to deal with one another upon the basis of strengthened administrative legal review, representing a potential widening of the jurisdiction of a voice-giving European constitutionalism to incorporate national judges within the joint effort to establish a 'legal constitutionalism' suited to the legitimation of impartial legal adjudication between the competing demands of social pluralism within Europe.[36] European law will not itself reach to better or less well-founded (economic) rationality theories in order to pass substantive judgement upon the national political collectivity. Instead, it will oversee the operations of the national political order to ensure that European voices and interests be given credence within it.

At a more removed level of constitutional theory, however, the nascent indications of a growth of 'legal constitutionalism'—or a normative, prepolitical and law-internal language (equity) within which the claims of competing political values and interests may be given voice—might also be argued to represent an initial attempt to establish a sustainable normativity within the law of Europe that is no longer prey to shifts in the real-world exercise of power and the unexpected consequences of the process of European integration. Detached from consideration of the legitimate membership of the polity (identification of the source of sovereign power) and educed instead from values historically established within the legal rather than political sphere, a grammar of equity, coupled with commitment to pragmatic analytical investigation of the points of contention that inflame competing interests within a plural polity, offers up one normative constant within a politico-legal sphere marked by shifting, newly formed and indistinct centres of political loyalty. While the law may not be able to choose between competing interests and values, it will seek to ensure that none are merely disregarded within the political cacophony that characterises the presence of social pluralism.

Finally, however, 'legal constitutionalism' at the European level is clearly still in its infancy. As such, it might also be challenged by one particular question: normativity ancient and modern—can Europe's law, more particularly its creative and co-ordinating 'centre', the ECJ, also protect legal constitutionalism from the inherent dangers of static and empty proceduralism? In other words, can the ECJ ensure that judicial dialogue centring on notions of equity, will not simply reproduce, on a grander European scale, the formalist hermeneutics of a supremacy debate, satisfying itself simply with the hollow reproduction of traditional administrative mechanisms of legal representation, such as, for example, the simple investigation of the presence of *ultra vires*?

In the final analysis, emergent social pluralism cannot be satisfied by a simple review of the (incoherent) limits to the exercise of (indistinct) power. Instead, the ECJ must also continue to engage in the creative and fluid linkage of an ancient notion of equity to emerging theories of democratic constitutionalism, fashioning the language, grammar and semantics of legal constitutionalism in the light of new demands for 'voice', democratic reflection and standards of deliberation with post-national polities. Granted, such a task is necessarily experimental. Nonetheless, recent re-adjustments in ECJ jurisprudence should teach us that the normative basis of modern governance, legal or otherwise, is, like 'knowledge' itself: 'no longer "given"…but rather…to be constructed and renewed in a process of collective learning that draws support from social pluralism'.[37]

NOTES

1. E.Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', *American Journal of International Law,* Vol. 75, No. 1 (1981), pp. 1–27, emphasis added.
2. A.-M. Burley and W.Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization,* Vol. 47, No. 1 (1993), p. 42.
3. A general conflict, having an effect far beyond the realm of European law, noted and bemoaned by Habermas as presenting a fatal weakness within many attempts to fashion governance orders that are both effective and moral, J.Habermas, 'Über den internen Zusammenhang von Rechstaat und Demokratie', in U.K.Preuß(ed.), *Zum Begriff der Verfassung* (Frankfurt a.M: Fischer, 1994), pp. 83–94. Within the Habermasian analysis, however, the notion of 'legalism' replaces the more pejorative term 'formalism', paying due homage to the underlying commitment of 'structured' lawyers, such as Stein, to dedicate careful hermeneutical analysis to the service of the democratic norms of the constitutional legal state *(Rechsstaat)*.
4. See below.
5. Although the practice of allowing the ECJ to report directly to IGCs would seem to herald a highly unusual recognition that a Court, the ECJ, might also act as a political interlocutor during a process of constitutional change.
6. For example, *Brunner v. European Union Treaty* [1994] 1 CMLR 971.
7. Applying as a pre-condition for membership to all applicant countries.
8. For example, Martin Shapiro's notion of the European Court as a third party dispute resolution mechanism heralding a change in the manner in which political scientists view the role of law in the resolution of political conflict from one of 'particularist tool' of a single political goal to one of 'necessary neutral mediator' between many political goals, M. Shapiro, 'The European Court of Justice', in P.Craig and G.de Burca(eds.), *The Evolution of European Law* (Oxford: Oxford University Press, 1998), pp. 273–320.
9. C.Joerges, 'Das Recht im Prozess der Konstitutionalisierung Europas' (EUI Working Paper 2001/6).

10. P.Schmitter, *How to Democratize the European Union…and why Bother?* (Lanham, MD: Rowman & Littlefield, 2000).
11. M.Everson, 'The Legacy of the European Market Citizen', in G.Moore and J.Shaw(eds.), *New Dynamics of Legal Integration* (Oxford: Oxford University Press, 1995).
12. ECR [1987] 405.
13. Shapiro, 'The European Court of Justice', p. 273
14. That is, national governments were legitimated to act by their own constitutional frameworks, whilst the European Commission found its basis for action in the treaties of the European Communities.
15. G.Majone, *Regulating Europe* (London: Routledge, 1996).
16. Ensuring that no insurer take on liabilities beyond their foreseeable means.
17. Joined Cases C-159/91 and C-160/91, [1993] ECR I-637.
18. With *Drijvende, Bokken* and *Bretjens*, Joined Cases C-115/97, C-116/97, C-117/97, C-219/97, [1999] ECR I-6025 and [1999] ECR I-6121.
19. Joined Cases C-180/98 to C-184/98 [2000] ECR I-6451.
20. See *Verband der Sachversicherer*, ECR [1987] 405 (para. 23).
21. No longer based upon formal notions of sovereignty, but upon a mutual recognition of the equality differentiated normative governance systems and their functional primacy in relation to different substantive matters of governance.
22. A curiously incomplete semantic, most clearly demonstrated by the somewhat artificial delineation of the primary internal market creating Article 28 [ex 30] through the notion that it will not apply to 'selling arrangements' (*Keck* & *Mithouard* [1993] ECR I 6097).
23. Joined Cases C-115/97, C-116/97, C-117/97, C-219/97, [1999] ECR I-6025 and [1999] ECR I–6121.
24. Joined Cases C-180/98 to C-184/98 [2000] ECR I-6451.
25. Joined Cases C-115/97, C-116/97, C-117/97, C-219/97, [1999] ECR I-6025 and [1999] ECR I–6121.
26. See, for comprehensive comparative analysis of national traditions (including US traditions), the opinion of Advocate General Jacobs delivered on 28 Jan.1999.
27. Joined Cases C-180/98 to C-184/98 [2000] ECR I-6451.
28. For a brief overview, see E.-J.Metsmäcker, 'On the Legitimacy of European Law', *Rabelszeitschrift*, Vol. 58 (1994), pp. 615–41.
29. For comprehensive explanation, see Majone, *Regulating Europe*.
30. That is, providing a bulwark against the establishment of concentrations of economic power.
31. Majone, *Regulating Europe*.
32. G.Majone, 'The European Community: An Independent Fourth Branch of Government' (EUI Working Paper SPS No. 93/9, 1993).
33. Mestmäcker, 'On the Legitimacy of European Law'.
34. For example, the absurdity of arguing that consumers need be protected from spirits with a 'low' alcohol content was readily revealed by the ECJ (Case 12/74 *Commission* v *Germany* [1975] ECR 181).
35. J.Shaw, *Law of the European Union* (Hampshire: Palgrave, 2000), p. 397.
36. Although the move from European Court as apex of a hierarchical European legal order to co-ordinating centre of a mass of national judges will clearly raise practical questions about the exact character of the adjudicators within Europe. Who exactly determines the nature of European legal constitutionalism? Which particular judges within the system of a European Court of First Instance, a full ECJ and a mass of national first instance and appeal judges will have their say in the construction of Europe and how?
37. J.Vignon, 'Governance and Collective Adventure', in O.de Schutter, N.Lebessis and J. Peterson(eds.), *Governance in the European Union* (Brussels: European Commission, 2001), p.3.

Conclusions

ROGER SCULLY AND RINUS VAN SCHENDELEN

The previous discussions in this volume have ranged widely in exploring the themes raised in the introduction. The importance of the topic of unelected legislators in the European Union (EU) has been reinforced by each of the contributors; the task of this concluding article is to assess their contributions, and consider to what extent they enable us to come to conclusions about the issues raised in the introduction. That is, to what degree is 'unelected legislation' also necessarily unrepresentative and undemocratic in nature? Are unelected legislators in the EU an excessively prevalent phenomenon that is thereby deeply problematic for the Union, or does their existence point to certain strengths? And is the phenomenon exceptional to the EU or does it reflect current practices at the national levels?

THE MAIN FINDINGS

The articles in the volume were not instructed to follow a tightly circumscribed format, but have addressed our topic from a number of perspectives. While we believe that this approach allows for the most rich and comprehensive approach to the study of unelected legislators possible within the confines of single, relatively short volume, it also necessitates a drawing together of the threads into a single set of conclusions. We begin with a brief summary of the central findings of each contribution, before going on to assess their broader implications.

The importance of Michelle Cini's analysis of the European Commission is not in pointing out that the Commission legislates and that the leadership of the Commission is unelected. As she observes, we knew that much already. As she further observes, some aspects of the Commission's legislative role are well known and have been widely discussed, including the right of formal initiative on secondary legislation, and the Commission's regulation and enforcement powers over legislation that are seen perhaps most starkly in the case of competition policy. The extent to which the Commission, and more particularly officials within the competition DG, have discretion not only over how to enforce policy but also choose what to prioritise and thereby develop competition policy is, however, not widely appreciated. Similarly, the scope given to *chefs de dossiers* within other DGs in drafting and formulating legislation has rarely been subject to systematic assessment and its importance has almost certainly been under-appreciated by

most academic observers: not least because much of the delegated legislation for which the Commission takes responsibility—while usually appearing narrow and technical on the surface—often has important implications. Another important development has been the use of 'soft law' instruments like recommendations and opinions by the Commission, which has been increasingly employed as a means of steering the development of policy. Cini's analysis is important not for telling us that the Commission legislates, but rather for helping us to understand much more about *how* it legislates, and *who* within the Commission is often responsible.

The role of 'in-sourced experts', analysed by Rinus van Schendelen, is of major importance to the governance of the EU, and yet has remained largely neglected by established texts on the Union. One important contribution by van Schendelen is simply to make clear the scale of the phenomenon, encompassing some 50,000 or so participants in the roughly 1,000 expert committees which act in an advisory capacity to the Commission, another 450 comitology committees, and a further 300 or so working groups which do much of the real work in developing the legislation formally passed by the Council of Ministers. Indeed, in the case of the latter groups, their role is such that the Council of Ministers—formally the main chamber for passing secondary legislation in the EU—only actually decides on some 13 per cent of the laws it is nominally responsible for! As far as expert and comitology committees are concerned, perhaps the most important finding is the extent to which, notwithstanding the differences in *formal* powers between expert committees and the three types of comitology committees, these collectives can often work in similar ways and with analogous results. Thus, although formally tools of the Council, comitology groups generally work more closely with the Commission. And the factors that enable a committee to function effectively and for its work to carry authority with external actors—such as the expertise (in both policy and political terms) of those involved, the absence of competitor committees and the lack of overt 'politicisation' of the issues they are dealing with—may be common across nominally very different committees.

The importance of the European Parliament, the only EU institution whose membership is directly elected, has grown substantially in recent times, as Karlheinz Neunreither reiterates. But 'the hidden hand' of unelected legislators can be seen at work even here. The emphasis on committee work within the parliament, and the important role played by rapporteurs in that work, creates a need for expert support for those rapporteurs which the parliamentary secretariat (or at least certain elements of it) help to fill. The secretariats of the party groups in the EP, and MEP's own assistants, can be important in helping rapporteurs develop their legislative work, although the evidence, Neunreither indicates, is that they are often not very important in this respect. Although parliament and parliamentarians are increasingly the subject of 'gratuitous' outside help from organised interests, efforts to improve the provision of internally based expertise within the EP have, so far, been only a qualified success, with the most recent set of reform proposals by the UK MEP James Provan, to develop greater committee-based expertise for MEPs, having failed to win adoption.

David Earnshaw and David Judge take our understanding of the influence of lobbyists on the European Parliament further. Defining the notion of 'lobbying' has long been notoriously difficult, as has been the measurement of its impact, and Earnshaw and Judge's analysis demonstrates the EP to be no exception in these respects. Indeed, they

show that even defining *who* is a 'lobbyist' can be complex: the assumption that all lobbyists constitute 'unelected' legislators becomes rather problematic when, as a result of the growing powers of the parliament, the EP increasingly faces lobbying from representatives of (elected) EU national governments. Other interests have also recognised that the growing role of the European Parliament requires them to lobby MEPs with greater urgency and from an earlier point in the legislative process. But the impact of such efforts is contingent on many factors, and it is far from clear that the role played by lobbyists is mostly (still less always) detrimental to the public interest in Europe. As Earnshaw and Judge show, unelected lobbyists and elected parliamentarians may often work as very close colleagues, with lobbyists providing MEPs with information that is both desired and necessary. At times this may generate the sort of 'inspired law' that we referred to in the introduction; more often, the process is rather more subtle and influence more difficult to trace.

Thomas Christiansen's analysis of the Council of Ministers secretariat makes it abundantly clear that our understanding of this institution has to move beyond the traditional image of it being merely a technical/functional body with no broader importance. The secretariat has long had—and to a large extent continues to have—a low profile, but it is today undoubtedly far more than a 'dignified conference centre'. The Council secretariat can be seen to have an important role in both primary (that is, Treaty reform) and secondary legislation. Although the importance of the secretariat's role is, Christiansen observes, contingent on a number of factors, not least its relationship with the Council Presidency, its central role in European bargaining and status as the sole recognised legal service and 'institutional memory' in treaty reform negotiations gives members of the Council secretariat considerable scope to be closely involved in, and influential over, both primary and secondary law-making. And in the developing area of foreign and security policy, in part due to the reluctance of national governments to empower the Commission excessively, the Council secretariat is developing an indispensable executive and law-making role.

Finally, Michelle Everson's analysis of the Court of Justice constitutes an important re-evaluation of a long-recognised 'unelected legislator'. As she makes clear, both 'legalist' and more 'realist' political science interpretations of the role and position of the ECJ within European integration may be increasingly inadequate. Neither the direct application of legal norms and doctrines, nor the understanding of law as 'mask and shield' for a political project of European constitutionalisation, may be appropriate tools for understanding the problems facing EU jurisprudence amid the challenge of 'social pluralism'. The shared concept of *equity* appears to be one means by which these unelected legislators are attempting to navigate through some very troublesome waters; nonetheless, with, as Everson reminds us, European legal constitutionalism still 'in its infancy', it is difficult to be definitive about the way ahead.

The different contributions to this volume have clearly reinforced the central point that unelected (and often largely unobserved) legislators in the European Union *matter:* such actors can be seen to play important roles in the politics of the Union at many different points and in many different ways. Recognition of *who* these unelected legislators are, however, has often been absent in the past. And even when such recognition has been present, *how* unelected legislators matter is often not obvious. Furthermore, it does not appear at all clear that the importance of unelected legislators in the European Union can

necessarily be regarded as 'bad', 'undemocratic' or 'harmful'. The next section considers further some of the analytical and normative implications of our findings.

ANALYTICAL IMPLICATIONS

The findings of this volume carry important analytical implications. First and foremost, they make clear that the phenomenon of 'unelected legislators' in the European Union is prevalent, and is multi-dimensional: it relates to many more issues than simply the relatively limited involvement of the European Parliament in the EU legislative process that prevailed until recent times. However, it is not clear this necessarily makes the EU at all distinctive as a polity. Though other systems of governance may have institutional structures quite different from those created at the European level, there are plenty of unelected legislators within the member states of the EU as well. Indeed, as the vast majority of public legislation in most European states is delegated law, the phenomenon of 'unelected' legislation and legislators cannot be said to be unique to the European Union. However, even more than at the national level, we have hitherto known very little about this very prevalent phenomenon, and much writing about the EU has been content to ignore it, almost as if it did not exist.[1] The range of political actors and processes we have identified and discussed in this volume must surely in the future become a far more central element in the study of the political processes of the European Union.

This point leads into a second analytical implication of our findings—that, as emphasised in the introduction and in several contributions, the formal 'skeleton' of political authority is far from a complete guide as to how legislation is made in the 'flesh and blood' reality and who wields political power and influence. Despite the EU possessing a set of formal institutional structures that differ quite substantially from those of member states, the phenomena of unelected legislators is a common feature, and many of those legislators may be behaving in similar ways in the EU and fulfilling similar political functions as their equivalents at the national or sub-national level. Even where unelected legislators operate because of specific features of the EU political system, the formal quasi-constitutional structures set by EU treaties tell us very little about what those unelected legislators will do or why it matters. This point is important because there has been great emphasis in recent years in political science on the political importance of formal institutional structures in politics.[2] This emphasis has certainly been present in much of the most prominent work on the EU, where there has been a substantial body of literature placing great emphasis on how the *formal* powers of institutions are central to political dynamics in the EU.[3] This volume shows the literature to be incomplete, and reinforces the degree to which such work can inevitably point to only a portion of the truth. This is not a particularly new lesson for students of politics;[4] but old lessons, re-learned and applied to particular contexts, can be just as useful.

As far as law-making is concerned, our findings clearly differ from both the simple and the modified theories of democratic legislation sketched in the introduction. They tend most closely towards our 'realistic' model of public law-making, but arguably go even beyond this model in their emphasis on the subtlety and complexity of the legislative process. Again, they suggest that to understand the making of law, we have to go beyond many of the obvious 'law-makers', while understanding the interactions of the

wider universe of actors to be more complex than previous models of politics may indicate. For instance, our findings indicate that simple and clear instances of 'inspired' law-making might be quite rare; a more common occurrence may be a much more interactive relationship between organised interests and those who occupy some of the more formally recognised law-making positions. The patterns of influence may go in both directions.

NORMATIVE IMPLICATIONS

What about the normative implications of our findings? The immediate tendency might be to think that the prevalence of unelected legislators in the EU is 'bad news' in showing the development of a system of governance at the European level to have become deeply imbued with practices that are, according to some or many, arguably non-democratic. Those with a flair for the dramatic might even seek to paint our findings as indicating that 'Brussels' is increasingly becoming a '(quasi-)constitutional dictatorship' of committees and officials not subject to formal mechanisms of public accountability and control through elections. Such a simplistic interpretation, however, would surely be unsustainable in many respects. For a start, it could only reflect an ignorance of our 'realistic' model of public law-making, and the prevalence of 'delegated' legislation referred to above. In this regard, as in others when the evolving system of governance in the EU is being evaluated, scholars and citizens need to keep in mind the question of what is an appropriate standard of comparison.[5] It would surely be both unfair and unrealistic to lambast the European Union for following practices that are prevalent also at the national level in well-established democracies, and thereby failing to meet abstract models of democratic governance that are observed nowhere in their entirety. Besides, in Europe there exist many different but equally serious notions of democracy, now undergoing Europeanisation. If applied to 'the unseen hand of unelected legislators', they can only result in different assessments of EU democracy which all need serious consideration.[6]

In this regard, we should recall exactly who many of the unelected legislators are that we have been discussing. There is the Court of Justice: members of this Court are unelected, but then such is the case almost universally for members of national supreme courts. Many of our other targets of analysis have been groups of officials—who, like officials in bureaucracies around the world, are also unelected. Would those criticising the influence of such actors on legislation expect elected politicians to ignore the advice and expertise of such officials? This would beg the question: why employ them in the first place? Similarly, organised lobbyists represent a variety of economic and social interests: would critics of unelected legislators advocate that in an open society the views and expertise of such interests should be ignored? What, presumably, is objectionable is 'excessive' influence—for instance, elected politicians accepting uncritically the advice or pressure of officials and/or lobbyists. Yet the findings of this volume suggest that such influence is rare, and that more commonly the interactions between different political actors is much more subtle than this: thus removing much of the force of the implied criticism.

Indeed, we can go further than this. The evidence offered by several authors in this volume indicates that, far from subverting normal democratic processes, unelected legislators may be necessary for such processes to work. The knowledge of officials and outside experts may be indispensable to those occupying the more formally recognised positions of legislative authority: for the latter to do their job properly, they often require advice and support from outside. Furthermore, there is a strong argument that the development of many of the unelected legislators identified here is a sign of emerging strength within the EU: that is, the development of an engaged interest sector and civil society around the formal institutions of European integration. This provides for important mechanisms by which the influence of civil society can be brought into the making of policy, almost certainly helping such policy to be better informed about important technical issues and about the concerns of particular groups. Given that many of the worst legislative fiascos occur when the concerns of outside interests are ignored, their presence as unelected law-makers in the EU is something about which scholars and citizens can be positive indeed.

FINAL WORDS

This volume has been, to some degree, exploratory in nature. While we would maintain that our topic is of considerable importance to students of the EU (and of politics and law-making more generally), the paucity of previous empirical work in this area is striking. Thus, while the contributions in this volume have advanced our knowledge significantly, they must inevitably remain some way short of the final word on the subject. And perhaps the most important conclusion to be drawn is the need for further investigation and consideration of the matters addressed here. Scholars should not be afraid of this topic. Though not always easy to investigate, we have shown that it is certainly possible. And it is altogether less normatively loaded than it appears at first glance. Most of all, investigation of ‘unelected legislators’ in the European Union is essential if we are ever to arrive at an adequate understanding of how this evolving European polity works.

NOTES

1. For instance, it is now standard practice for introductory textbooks on the European Union to have chapters on the major institutions, such as Council, Commission, Parliament and Court. But within those chapters, the focus is rarely on the more ‘hidden’ actors that we have considered here. Nor are other unelected legislators, like experts insourced from outside, often given much attention. For prominent examples of this neglect among leading introductory texts in the EU, see D.Dinan, *Ever Closer Union: An Introduction to European Integration* (London: Macmillan, 2nd edn., 1999), J.McCormick, *Understanding the European Union: A Concise Introduction* (London: Macmillan, 1999) or N.Nugent, *Government and Politics of the EU* (London: Palgrave, 5th edn., 2003).
2. This emphasis on ‘formal’ institutions is seen perhaps most prominently in work inspired by the rational choice analytic tradition. For a good overview of this approach, and some of its major findings, see B.Weingast, ‘Rational Choice Institutionalism’, in I.Katznelson and H. Milner(eds.), *Politicial Science: The State of the Discipline* (New York: W.W.Norton, 3rd edn., 2002).

3. See, for example, the literature devoted to analysing the direct impact of the introduction of the co-operation and co-decision legislative procedures, including *inter alia* G.Tsebelis, 'The Power of the European Parliament as a Conditional Agenda Setter', *American Political Science Review*, Vol. 88 (1994), pp. 128–42; P.Moser, 'The European Parliament as a Conditional Agenda Setter: What are the Conditions? A Critique of Tsebelis (1994)', *American Political Science Review*, Vol. 90 (1996), pp. 834–8; R.Scully, 'The European Parliament and the Co-Decision Procedure: A Reassessment', *Journal of Legislative Studies*, Vol. 3 (1997), pp. 58–73; B. Rittberger, 'lmpatient Legislators and New Issue Dimensions: A Critique of Garrett and Tsebelis' "Standard Version" of Legislative Politics', *Journal of European Public Policy*, Vol. 7 (2000), pp. 554–75; G. Tsebelis *et al.*, 'Legislative Procedures in the European Union: An Empirical Analysis', *British Journal of Political Science*, Vol. 31 (2001), pp. 573–99.
4. For instance, the 'behavioural revolution' in American political science in the 1950s and 1960s was based on a criticism of previous work for excessive concentration on the formal structures of power, and advocating instead far greater analytic attention to the measurement of observable patterns of behaviour among political actors. See R.Dahl, 'The Behavioural Approach in Political Science: Epitaph for a Monument to a Successful Protest', *American Political Science Association*, Vol. 55 (1961), pp. 763–72.
5. This theme is developed further in A.Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, Vol. 40 (2002), pp. 603–24, where Moravcsik observes that 'Many critics overlook the relatively optimistic conclusion to be drawn from the evidence because they analyse the EU in ideal and isolated terms. Comparisons are drawn between the EU and an ancient, Westminsterstyle, or frankly utopian form of deliberative democracy. While perhaps useful for philosophical purposes, the use of idealistic standards no modern government can meet obscures the social context of contemporary European policy-making—the real-world practices of existing governments and the multi-level political system in which they act. This leads many analysts to overlook the extent to which delegation and insulation are widespread trends in modern democracies…with a great deal of normative and pragmatic justification' (pp. 605–6).
6. R.van Schendelen, *Machiavelli in Brussels: The Art of Lobbying the EU* (Amsterdam: Amsterdam University Press, 2002), especially chapter 8: 'EU Lobbying and Democracy'.

Abstracts

The Unseen Hand: Unelected EU Legislators—Introduction *by Rinus van Schendelen and Roger Scully*
This paper begins the volume by introducing the subject of unelected legislators in the European Union. We first explore alternative theories of how legislation is passed in democratic polities, explaining why simple notions that all legislation should be the responsibility of elected representatives are unrealistic and possibly even undesirable. We then outline both the complexities and the importance of the legislative process in the EU, explaining the major types and sources of law. Finally, we preview the following contributions to the volume, indicating how they contribute to the examination of our general theme.

The European Commission: An Unelected Legislator? *by Michelle Cini*
This article argues that the European Commission is an unelected legislator. Although the Commission is rarely defined *de jure* as a legislative body within the EU's system of governance, it does serve as a *de facto* legislator in three important respects. First, the Commission's role as an agenda-setter and policy formulator gives it a great deal of influence over legislative outcomes. Second, it performs an important regulatory role. While this includes the direct implementation of European legislation in a small number of policy areas, such as competition policy, it also results from the delegation of important executive functions from the EU Council to the Commission. Thus, the Commission is responsible for much of the specific content of legislative acts, with the Council and Parliament deciding on the general framework. Third, the Commission also performs an informal function as policy-maker, epitomised by the expanding Commission preference for the use of soft law and other non-binding measures. While there is some debate as to whether soft law really is 'law', the political (if not the legal) effects of such measures are potentially enormous.

The In-Sourced Experts *by Rinus van Schendelen*
This paper assesses the role and impact of 'insourced experts' on EU lawmaking. After explaining the principal reasons for the use of such experts, the analysis goes on to examine in detail the different avenues by which such expertise is introduced into the policy process: 'expert' committees, comitology committees and Council working groups. Finally, an assessment of the impact of in-sourcing expertise is made. It is argued that distinct positive aspects to the phenomenon exist—which is normatively fortunate, as in-sourcing expertise is likely to be an enduring feature of the EU policy process.

Elected Legislators and their Unelected Assistants in the European Parliament *by Karlheinz Neunreither*

Members of the European Parliament (EP) are elected, but only relatively recently have they acquired a significant role in EU law-making. After reviewing the EP's involvement in EU legislation, giving particular attention to the role of rapporteurs, this article examines the several sources of unelected legislative assistance that are available to MEPs. These include elements of the EP secretariat, the party group secretariats, MEPs' private staffs and 'outsiders' to the parliament. The respective contributions of these actors are assessed and, also examined, are recent proposals for reform of the way that the EP uses assistance in fulfilling its increasingly important function as a legislature.

No Simple Dichotomies: Lobbyists and the European Parliament *by David Earnshaw and David Judge*

The effects of lobbying in the European Parliament are contingent and not certain. They fluctuate in accordance with inter-institutional interactions, national interests, types of policy, types of legislation, as well as the style of lobbying, the coalitions formed around specific policies, and the nature of resources deployed by lobbyists themselves. Alongside any empirical assessment of the effects of lobbying, a parallel normative dimension of the promotion of sectional interests also has to be considered. In order to highlight these normative and empirical issues, first, some broad observations about the interactions between lobbyists and MEPs are made; and, second, an examination of the processing of the Tobacco' directive in 2000–2001 is provided to substantiate some of these general claims. Overall, the analysis points to the complexity of the processing of legislation within the EP and to the multidimensionality of EU decisionmaking. In these nested dimensions the normative certainties of 'good' and 'bad', commonly associated with the adjectives 'elected' and 'unelected', need to be re-examined, as does the very concept of 'legislator' itself.

Out of the Shadows: The General Secretariat of the Council of Ministers *by Thomas Christiansen*

The Council secretariat has been an influential (and of course unelected) player in the European Union's legislative process for much of its institutional life, even though this role has hardly ever come under close public scrutiny. However, recent and ongoing institutional reforms and constitutional debates in the European Union have highlighted the significance of the secretariat, in terms of past developments as well as with respect to current and future changes in the institutional architecture. This article seeks to illuminate the role of an institution that has, for the most part of its history, remained in the shadows of the integration process, but which is now entering centre-stage. Its role as unelected legislator is examined in three specific areas: the traditional legislative process in the EU's so-called 'first pillar', policy-making in the area of Common Foreign and Security Policy (CFSP) and the procedures for the reform of the EU's treaties. Each of these areas constitutes an important dimension of European integration, and the overall perspective provides useful insights into the law-making role of the Council secretariat. The article concludes by highlighting the way in which recent and future developments challenge the established character of the secretariat and its role in the EU's policy process more generally.

Social Pluralism and the European Court of Justice: A Court Between a Rock and a Hard Place ***by Michelle Everson***

The collision of European market rationalities with national values of social provision in the recent raft of 'social insurance' cases has exposed the European Court of Justice (ECJ) to the extreme difficulties of adjudication under conditions of social pluralism. Necessarily distanced from its own (quasi-economic) adjudicational grammar of 'supremacy', the Court has been required to develop a new judicial language that pays adequate regard to the competing economic, political and social claims of the EU, the member states and individual European citizens. Founded in ancient legal notions of 'equity', common to all national legal systems, this new language might be argued to be exemplary of a novel 'legal constitutionalism' developed by the ECJ in order to overcome the lacunae in a normative scheme of European governance that is failing to keep pace with changes in the 'real-world' mode in which Europe is governed.

The Unseen Hand: Unelected EU Legislators—Conclusions ***by Roger Scully and Rinus van Schendelen***

This concludes the volume by summarising the major findings and assessing their broader implications. We briefly review the individual findings of each paper, observing that they collectively reinforce the importance of the subject of unelected legislators in the EU while also pointing to the complex and multiform nature of the phenomenon. We thus go on to argue that many of the unelected legislators identified here ought to become more central to EU studies than has traditionally been the case; that understanding their role may often be more important to understanding policy-making than knowledge of formal institutional structures; but that the prevalence of unelected legislators does not necessarily carry the negative normative implications for the EU that simplistic understandings of the legislative process might suggest.

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